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JS
JA
UX
v.

R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED

IN THE COURTS OF

Common Pleas & Exchequer Chamber,

WITH

**TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL
MATTERS.**

—◆—
BY JOHN BAYLY MOORE,

OF THE INNER TEMPLE, ESQ.

—◆—
VOL. VIII.

CONTAINING THE CASES FROM EASTER TERM, 4 GEO. IV. 1823,

TO

HILARY TERM, 4 & 5 GEO. IV. 1824, BOTH INCLUSIVE.

=====
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JUDGES

OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Lord Chief Justice, who resigned in Michaelmas Vacation, 1823, and was succeeded by

The Right Hon. BARON GIFFORD, Lord Chief Justice.

The Hon. Sir JAMES ALLAN PARK, Kut.

The Hon. Sir JAMES BURROUGH, Knt.

The Hon. Sir JOHN RICHARDSON, Knt.

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CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN EASTER TERM,

IN THE FOURTH YEAR OF THE REIGN OF GEORGE IV.



MEMORANDA.

IN the course of the last vacation, *John Hullock*, Esq. Serjeant at Law, was appointed one of the Barons of His Majesty's Court of Exchequer, which office was void by the resignation of Mr. Baron *Wood*; and he took his seat in that Court on the first day of this Term.

The continued indisposition of Mr. Justice *Richardson* prevented his attendance in Court during the whole of this Term.

1823.

Thursday,
April 17th.

STEAD v. LIDDARD.

Where the plaintiff, being in advance to the defendant's son, for the cost of part of a cargo of fish, in which the latter was partly interested, wrote to him, stating that he had drawn on him, and requesting him to accept the bills, to be appropriated for the repayment to the plaintiff: and the defendant's son was, on the other hand, to remit the plaintiff the proceeds of the cargo, to meet the payment of the acceptances: and the son agreed to the contents of that letter, by a memorandum, written and signed by him, at the foot thereof: and the defendant

THIS was an action of *assumpsit*, brought against the defendant, on a guarantie, to be responsible and accountable to the plaintiff for the proceeds of a cargo of fish and oil, which might be received by the defendant's son, *per* the ship *Fancy*. The declaration contained several special counts on the guarantie, and the common money counts. Plea.—*Non assumpsit*.

At the trial before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after the last Term, it appeared, that in *July*, 1819, the plaintiff arrived at *Drontheim*, with part of a cargo of stock-fish on board the *Fancy*. That the defendant's son, *Lewis Agassiz Liddard*, was a resident there. That through his assistance the cargo was completed, by the purchase of other stock-fish, and 200 barrels of oil, which were paid for by the plaintiff, partly by bills drawn by him upon, and accepted by, the defendant's son, and partly by bills drawn by the plaintiff upon a house in *London*, payable to the order of the defendant's son. During the time the plaintiff was at *Drontheim*, the defendant's son requested that he might be allowed to have a share in the adventure, which was acceded to by the plaintiff, on condition of his advancing one-third of the cost of shipment, and other incidental expenses. On the plaintiff's return to *London*, in *Nov.* 1819, he ascertained that four of the bills drawn by him on the *London* house, and guarantie written by him at the back of the same letter, agreed to pay to the plaintiff, or his bankers, all sums which might come to his hands, agreeably to the terms of such letter, and be responsible to the plaintiff for the proceeds that might be procured by his son for the cargo:—Held, in an action of *assumpsit* on the guarantie, *first*, that one agreement stamp was sufficient under the statute 55 Geo. 3, c. 184, as the whole of the instrument containing the guarantie must be taken together, and as forming part of one transaction; and, *secondly*, that as the guarantie referred to and adopted the terms of the plaintiff's original letter to the defendant's son, and which was approved of by him, there was a sufficient memorandum of the consideration within the statute of frauds.

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left in the hands of the defendant's son, to be indorsed by him, in payment of part of the cargo, had been transferred by him, by way of loan, to Messrs. *Jensons* and *Co.* of *Drontheim*, and that the oil had been shipped by him in his own name, and as on his own account, without the concurrence of the plaintiff, to two mercantile houses at *Amsterdam* and *Altona*. No part of his proportion of the sum engaged in the adventure having been paid, the following correspondence took place between the parties, and was tendered in evidence, to prove the guarantie, on which the present action was founded. The first letter, which was written by the plaintiff, addressed to the defendant's son, was as follows:—

“ 15, *Bush Lane*, 29th Dec. 1819.

“ Dear Sir,—Having paid the chief part, and come under acceptances for the remainder of the cost of the cargo of fish *per the Fancy*, and 200 barrels of oil to *Amsterdam* and *Altona*, with the freight and premium of insurance *per Fancy*, also paid by me, I have drawn upon you of this date:—

“ At two months date, for - - 1600*l.*

“ At four months date, for - - 1000*l.*

2600*l.*

Which you will be pleased to accept; and I pledge myself the same shall be appropriated to the repayment to me of the above; and you, on the other hand, are to remit your father or me the proceeds of the above goods, and the balance due by *Jensons* on the bills given them at *Drontheim*, to meet the payment of your acceptances as above, to be put into the hands of my bankers, Sir *P. Pole* and *Co.* for the purposes mentioned. The profit or loss on the cargo of fish *per Fancy*, and the 200 barrels of oil, being, on account of yourself, one-third, and of me, two-thirds.

“ I am, &c.

“ *D Stead.*”

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At the foot of the above letter, the defendant's son wrote as under:—

"Above is a copy of a letter handed to me this day, by Mr. *Stead*, and I agree to its contents, errors excepted, having accepted the bills in question, to be handed to Sir *P. Pole* and *Co.*

"*Lewis Agassiz Liddard.*

"*Bermondsey, 29th Dec. 1819.*"

The above was then left with the defendant, to be handed over by him, with his guarantie, for the payment of the above acceptances to the plaintiff; and the following memorandum or guarantie was written by the former on the back of the letter, and transmitted to the plaintiff accordingly.

"Mr. *D. Stead*,

"26th Feb. 1820.

"Sir,—I hereby agree to pay, or to hand over to you, or to Sir *P. Pole* and *Co.*, immediately on the receipt thereof, all such sums of money and bills of exchange, as may come to my hands from, or may be remitted to me by, my son, *Lewis Agassiz Liddard*, agreeably to the foregoing copy of a letter and agreement or undertaking; such bills or monies to be appropriated to the payment of the acceptances mentioned in the said copy letter. And in consideration of your having paid for the whole cost of fish and oil, as therein stated, and having given to the said *L. A. Liddard* an interest in such shipment to the extent of one-third, I hereby engage to be responsible and accountable to you for the proceeds that may be procured by him for the same, and for the due application and remittance by the said *L. A. Liddard*, in conformity with said copy letter, of all monies and bills which he may receive, or that may be

paid to his order, on account of the said fish and oil, and the balance of bills given to *Jensons*.

"I am, Sir, yours, &c.

"*Wm. Liddard.*"

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In consequence of these arrangements, the defendant's son was permitted to continue in the superintendence of the sales of the cargo, and having received all the proceeds without accounting at all to the plaintiff, the present action was brought against his father, on his guarantie: and when the letter on which it was written (being one sheet of paper only), was produced in evidence, it was impressed with one agreement stamp of 1*l.* 15*s.* when it was objected, that two were necessary, as the defendant's guarantie was not connected with the original agreement between his son and the plaintiff. His Lordship, however, overruled the objection, and the jury accordingly found a verdict for the plaintiff: but the point was reserved for the consideration of the Court.

Mr. Serjeant *Lens* now applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered; and submitted, in the *first* place, that the action could not be maintained, as the guarantie of the defendant, on which it was founded, was inadmissible in evidence, for want of a proper stamp; and, *secondly*, that even if it were, there was no sufficient consideration on the face of it, to entitle the plaintiff to recover. *First*, The defendant was no party to the agreement between the plaintiff and his son, as to what manner the proceeds of the cargo should be debited and appropriated, and although it may be said that the guarantie refers in terms to the plaintiff's original letter, yet, they must be considered as two distinct and separate agreements; for, although they were written on the same sheet of paper, they were between different parties, and conse-

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quently required separate stamps. Although by the statute, 55 Geo. 3, c. 184, Sched. Part 1, tit. Agreement (a), it was provided, that the stamping of one of several letters should be sufficient; yet here, the letter from the plaintiff to the defendant's son, could not affect the defendant, as the statute applies only to letters or agreements between the same parties. The two transactions, therefore, were perfectly distinct; and as the original letter only was stamped, the guarantie cannot be rendered available, as against the defendant, unless it had a stamp of a similar description.—*Secondly*, There is no sufficient consideration to support the defendant's undertaking; as the guarantie, not only refers to a consideration as between the plaintiff and his son, but to a past or executed consideration affecting the two former alone, viz. in consideration of the plaintiff's having paid the whole cost of the fish and oil; and which, without the addition or proof of a previous request, amounted to no consideration whatever; and the cases of *Wain v. Warters* (b); *Saunders v. Wakefield* (c); and *Jenkins v. Reynolds* (d); are decisive to shew, that, in order to render a defendant liable, on a guarantie, within the statute of frauds, the consideration or promise for the undertaking, must appear on the face of the instrument.

Lord Chief Justice DALLAS.—I am of opinion, that there is no ground whatever for either of these objections, and more particularly so, as to the first. The guarantie given by the defendant referred to the original letter, written by the plaintiff to his son, and recognized and adopted the

(a) By which it is provided, that where divers letters shall be offered in evidence, to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l.* 1*s.*, although the same shall in the whole contain twice the number of 1080 words or upwards.

(b) 5 East, 10. — (c) 4 Barn. & Ald. 595. — (d) *Ante*, Vol. VI. p. 86.
 S. C. 3 Brod. & Bing. 14.

terms as therein stated; and it must be considered as having such retrospective operation, as the defendant, thereby, engaged to pay, or hand over to the plaintiff, or his bankers, all such money as might come to his hands, or be remitted to him by his son, agreeably to the plaintiff's former letter. The whole, therefore, forms but one transaction; and more particularly so, as it was written on one and the same sheet of paper.—I also think, that there is a sufficient memorandum of the consideration to bring this case within the statute of frauds; as, taking all the transaction together, it furnishes evidence of a request, which, by the terms of the commencement of the guarantie, cannot be said to apply to a past or executed consideration, as the defendant undertook to pay the plaintiff all sums which might come to him from his son, on account of the cargo in question.

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STEAD
v.
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Mr. Justice PARK.—This instrument cannot be considered as a mere insulated paper: and the statute 55 Geo. 3, c. 184, expressly provides, that where divers letters shall be offered in evidence to prove any agreement between the parties, one stamp shall be sufficient. There is, therefore, no pretence to say, that another stamp was requisite; and, on looking at the whole of the transaction, I am of opinion, that there is a sufficient consideration expressed on the face of the guarantie to entitle the plaintiff to recover, and we are not bound to confine ourselves to one letter alone: it therefore appears to me, that this verdict ought not to be disturbed.

Mr. Justice BURROUGH.—The Legislature clearly intended, that where an agreement is contained in a series of letters, it is sufficient to have an agreement stamp affixed to any one of them; if not, it would be requisite to stamp every letter, although the correspondence might be most voluminous. Besides, it is not confined to letters written by

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the *same* parties, and here the whole of the subject matter is contained on one sheet of paper. In point of law, therefore, it must be considered as one agreement, and tending to bind the defendant, and more particularly so, as he referred to the terms of the plaintiff's original communication to his son; and it must be taken that he entered into the guarantie at the request of the latter. At all events, it furnishes evidence of such a request. I therefore concur with the Court, in thinking that there is no ground for this application.

Rule refused (a).

(a) See *Butts v. Swan*, ante, Vol. IV. p. 484; *Firbank v. Bell*, 1 Barn. & Ald. 36.

Thursday,
April 17th.

SMITH v. CRANE and another, Bail of DAVIS.

Where two writs of *scire facias* had been sued out against the defendants, on a recognizance of bail, and to which two *nihil*s were returned, on which judgment was signed and execution issued, the Court refused to set aside such judgment and execution, on the ground that the bail had no notice of the writs of *scire facias* having issued, although they lived in the county of *Middlesex*; as, by their entering into a recognizance, they made themselves personally liable; and as it was their duty to watch the proceedings in the Sheriff's office.

MR. Serjt. *Tuddy* applied on behalf of the defendants, that two writs of *scire facias*, which had been issued against them by the plaintiff, on their recognizance, and the judgment and execution which had been issued and levied thereon, might be set aside, for irregularity, with costs.—He founded his motion on an affidavit which stated, that two writs of *scire facias* had been issued against them, to which two *nihil*s had been returned. That the defendants were both actually resident in *Middlesex*, and had received no notice or summons of the writs of *scire facias* having been issued.—He relied on the case of *Lowe v. Robins* (a), where the Court set aside a judgment obtained by the plaintiff on a *scire facias* for irregularity; the defendant having had no personal notice of the writ of *scire facias* having issued: and Lord Chief

(a) *Ante*, Vol. III. p. 757; S. C. 1 Brod. & Bing. 381.

Justice *Dallas*, in delivering the judgment of the Court there, said: (b) "We think, that where the defendant resides within the bailiwick of the Sheriff to whom the writ is directed, he ought to have notice by summons from the Sheriff; and that in such case, a return of *nil*, stating that he has nothing in his bailiwick whereby he can be summoned, cannot be supported." Although, there, the motion was to set aside a judgment obtained under a *scire facias*, founded on a previous judgment, the same rule is applicable in relief of bail, where the defendant resides within the bailiwick of the Sheriff, to whom the writs of *scire facias* are directed. He also referred to *Davis v. Norton* (c), to shew, that where an execution has been irregularly sued out, on a judgment revived by *scire facias*, the Court will set it aside, on the terms of the defendant's undertaking to bring no action; and it must be inferred from that case, that a return of two *nils* is not equivalent to notice.

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&
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But the Court held, that personal or actual notice to the bail was not necessary, and Mr. Justice *Burrough* observed, that it had been so considered by the Court of King's Bench, in *Sillitoe v. Wallace* and another, bail of *Cawthorne* (d), where it was determined, that it was not necessary to give notice of *scire facias's* to the bail; it being their duty to watch the Sheriff's office where they were lodged. In *Lowe v. Robins*, the application was made by the defendant himself, to set aside the judgment which had been irregularly issued against him, as the motion to issue the writ of *scire facias*, on which it was founded, was made in vacation. That case, therefore, is wholly inapplicable to proceedings against bail on their recognizance. And in *Davis v. Norton*, the *scire facias* was sued out unnecessarily to revive a judgment on a warrant of attorney against

(b) 3 Moore, 761.—(c) *Ante*, Vol. VII. p. 499.—(d) 2 Tidd, 7th Edit. 1162.

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v.
CRANE.

the defendant, and the *feri facias* did not recite the *scire facias*. But in a proceeding against bail, they are not entitled to notice as in the case of executors, as there the fruits of the levy are to be derived from the assets of the testator's estate; whereas, bail, by entering into a recognizance, make themselves personally liable.

The learned Serjeant, therefore, took nothing by his motion.

(b) See *Clarke v. Bradshaw*, 1 East, 89.

Friday,
April 18th.

ROBERTSON v. FAUNTLEROY.

Where an infant who was entitled to certain personal property, on her coming of age, as a residuary legatee, joined her father in a bond to secure to the plaintiff a sum due to him for the rent of apartments occupied by her and her father, and after she became of age, employed the defendant to take out administration *de bonis non* of

THIS was an action of *assumpsit* for money had and received.—The defendant pleaded the general issue.

At the trial of the cause, before Lord Chief Justice Dallas at Westminster, at the Sittings in the last Term, the plaintiff claimed to recover from the defendant, the amount of a bond given by Baron Pfeilitzer to the plaintiff for securing 150*l.*, and also, for the amount of a bill of exchange, for 115*l.* drawn by the plaintiff upon, and accepted by the Baron.—It was given in evidence, that Baron Pfeilitzer and his two daughters, during their residence in this country, had occupied furnished apartments in the plaintiff's house; and that the latter, who were then minors, were residuary legatees, under the will of one Lucas Garvey, formerly of the island of *St. Christopher*; that the assets of the testator, (his executor being dead), which the defendant accordingly did, and became possessed of the property; and she afterwards gave the plaintiff an order on the defendant to pay the amount of her father's bills due to the former, which on being presented to the defendant, he acknowledged that he possessed adequate funds, and that a person would be safe in advancing money on the security of the bond: but, before the order was executed, or the sum paid under it by the defendant, the daughter countermaunded it:—Held, that, as he had consented to appropriate a sum sufficient to pay the plaintiff's demand, he was liable to an action for money had and received, in which the plaintiff might not only recover the amount of the bond, but an acceptance given by the father of the infant, before she became of age, and which she afterwards requested the defendant to pay.

executor under that will possessed himself of the personal estate of the testator in this country, and afterwards died. That on the eldest of the daughters attaining 21, she executed a power of attorney to the defendant, by virtue of which he obtained a grant to himself of the administration *de bonis non* of *Garvey*, and afterwards applied to the representatives of his executor to transfer to him the effects of the testator, which were left unadministered, and which he accordingly received. On the production of the bond, it appeared to have been executed by the Baron and his two daughters, and his acceptance to the bill was also proved. The following written order addressed to the defendant, by the eldest daughter, after she became of age, was then given in evidence, viz.—

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“ Dear Sir,—Out of the monies in your hands received on my account, by virtue of my power of attorney, I request you to pay to the plaintiff the amount of those bills which he has of my father’s, (if they are not already paid), and place the same to my account.

(Signed)

Anne Pfeilitzer.”

It was also proved, that on this order having been presented by the plaintiff to the defendant, as well as the bond and bill, he said “there was already money sufficient in *London* to pay the whole of the Baron’s debts, but that owing to a little informality in the power of attorney, he had not yet got the money into his hands, but believed he should have it shortly, when the order should be attended to:” that, on being afterwards applied to for payment, he further observed, that “he had got the money, and that he himself was a creditor of the Baron’s.”—For the defendant, a letter written to him by Miss *Pfeilitzer*, six months after the date of the above order, was produced, by which she revoked all the several orders and authori-

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ties which she had theretofore signed, authorising him to pay any debts due from her father out of her share of the monies in the defendant's hands as administrator of *Garvey*; and she requested, that, should application be made to him for payment by persons holding such orders, he would refuse payment thereof, until he received her further directions; and that she would indemnify him from the consequences of so doing.

His Lordship was of opinion, that the previous order of Miss *Pfeilitzer* to the defendant, after she became of age, for the payment of her father's bills to the plaintiff, extended to the bond, as well as the bill of exchange; and that the defendant had rendered himself liable to the payment of the amount of those instruments by the promises he had made subsequently, notwithstanding the revocation or countermand afterwards made by her: and the jury accordingly found a verdict for the plaintiff.—Damages, 265*l*.

Mr. Serjt. *Vaughan* now applied for a rule *nisi* that this verdict might be set aside, and a new trial granted, or that the damages might be reduced to 115*l*. being the amount of the bill of exchange. He submitted, that, as the debt was contracted by the Baron, during the infancy of his daughters, there was no consideration on which to found a promise by the latter; and that the order given by the eldest, after she became of age, was, at all events, revocable by her, before any payment had been made on her account. That the promises by the defendant must be considered as having been made without consideration, or at least in his representative character of administrator only: that he could not have been liable, even if he had had assets in his hands, to be sued at law; the plaintiff's claim arising from a legacy to be paid to Miss *Pfeilitzer*; and a legatee cannot maintain an action against an administra-

tor, to enforce payment of a legacy, *Deeks v. Strutt* (a). In *Bowerbank v. Monteiro* (b), it was determined, that an undertaking by an executrix, on accepting a bill for a demand on the estate of her testator, to pay on receipt of sufficient effects; means effects received after demands entitled to priority are satisfied. There, when she accepted the bill, the plaintiffs gave her a receipt in writing, stating that they had received the acceptance, which they promised to renew from time to time, until sufficient effects were received from the estate of the testator; and Mr. Justice *Gibbs* observed, that, (c) "the words 'until sufficient effects were received,' meant sufficient effects according to the subject matter; and that the true construction was, to pay when she should receive assets legally applicable to that purpose." And Mr. Justice *Chambre* said, that (d) "the defendant gave the plaintiffs a preference over other creditors in equal degree; that she certainly could not avail herself, in account with the plaintiffs, of the payments she had made to other simple contract creditors; but that it would be a grievous disadvantage to her, if she was bound by the agreement to commit a *devastavit*, for which she would be personally liable to others." So, here, if the defendant were bound to pay according to the terms of the order, he would be guilty of a *devastavit*; as it eventually appeared, that there were not sufficient assets belonging to the testator, to satisfy all the claims on his estate. The promise by the defendant must be taken to have been made by him in his representative character, to appropriate so much of the funds of the testator, which he might become possessed of, as were applicable to the payment of the plaintiff's demand, and not to render himself liable at all events. But as the order given by Miss *Pfeilitzer* was confined to the payment of the bills of her father, it could not possibly include the bond, although it

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(a) 5 Term Rep. 690.—(b) 4 Taunt. 844.—(c) 4 Taunt. 847.—
(d) Ib. 846.

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might be construed to extend to the bill of exchange, to which alone it must be confined; and the verdict must be reduced accordingly.

Lord Chief Justice DALLAS.—This was an action brought to recover a certain sum of money from the defendant, stated to have been received by him for the use of the plaintiff, and which it appears he consented to appropriate to the latter, for a debt fairly and justly due to him from Baron *Pfeilitzer*. It was proved, that, during the residence of that nobleman in this country, he, together with his two daughters, who were infants at the time, had occupied apartments in the plaintiff's house; and that the Baron had incurred debts to a considerable extent; that the arrears of rent due to the plaintiff having accumulated, he became uneasy, and requested a security, when the Baron gave the bond in question, in which his two daughters joined. They, at the time, lived with their father, and, together with him, partook of the benefit of the occupation of the plaintiff's house. It was stated to the plaintiff, that the daughters had a considerable property left them by a relative, who had died abroad, and which they expected shortly to receive from funds left by him in this country. This was held out to the plaintiff, in order to induce him to allow the Baron to continue the occupier of the apartments, who afterwards accepted the bill in question, as a further security; and the eldest daughter, after she became of age, confirmed her liability on the bond, by giving the order in question to the defendant. The only question then is, whether the plaintiff is, under these circumstances, entitled to recover? After he had received the order, a person waited on the defendant, at his request, and on his behalf presented it to him for the purpose of obtaining payment of the amount of the bills due from Miss *Pfeilitzer's* father to the plaintiff. The terms of the bond, as well as

the bill of exchange and the order, were read, and explained at the time: to which the defendant replied, that he had money sufficient in *London* to pay the whole of the Baron's debts; but that, on account of some informality in the power of attorney, he had not yet got the money, but that he believed he should have it in a fortnight or three weeks, when this demand should be paid. It was also proved that this person had other interviews with the defendant on the subject of the plaintiff's debt; that at the last he stated that he had got the money, and that the person applying might make an advance to the plaintiff with safety, on the faith of the securities; and that although he had got it, yet he should be glad to accept 5s. in the pound on account of his debt, as he was a creditor of the Baron's. It therefore appears to me, that the defendant consented to appropriate a part of the sum received by him from the Baron's estates in satisfaction of the plaintiff's debt; and more particularly so, as the person who applied to him for it, might have been induced to have advanced money on the faith of the securities, in expectation of being repaid by the defendant, in consequence of the promise he had made.

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Mr. Justice PARK and Mr. Justice BURROUGH being clearly of opinion, that, under these circumstances, the plaintiff was entitled to recover—

Rule refused.

HEXT, Plaintiff; COCKEY, Deforciant.

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MR. Serjeant *Lens* moved that this fine might be amended by altering the christian name of the deforciant, from the christian name of the deforciant from *Ellen* to *Eleanor*, where she had been always known by the former, although her real baptismal name was *Eleanor*. It is unnecessary to amend a fine by altering

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Ellen to *Eleanor*, on an affidavit, which stated that she had always been known by the former name only, and had herself signed it so at the time the acknowledgment was taken; but that, on reference to the register of the parish in which she was born, it was discovered that her baptismal name was *Eleanor*, and that no person by the name of *Ellen Cockey* appeared in the register of that parish.

But the Court observed, that, as she had always been known by the name of *Ellen*, the amendment was unnecessary; and that, if it were so, the *dedimus*, and all the other necessary instruments relating to the fine must be altered, which would be attended with considerable expense; and that it would be a sufficient answer to a plea in abatement, to reply that she was known by the one name as well as the other.

The learned Serjeant therefore took nothing by his motion.

Saturday,
 April 19th.

CLIFFORD v. BURTON.

THIS was an action of *assumpsit* for goods sold and delivered.—At the trial, before Lord Chief Baron *Richards*, at the last assizes at *Hertford*, it appeared that there had been mutual dealings and accounts between the plaintiff and defendant; and the only question was, whether the sum of 10*l.* was due from the latter to the former. The only evidence to substantiate that fact was an admission or declaration made by the defendant's wife, who served in his shop, and conducted the business of it during his absence; that on her being applied to on behalf of the plaintiff, she delivered previously to an application for payment, when she admitted that a certain sum was due to the plaintiff, and that she would pay it if he would make a deduction, to which she claimed to be entitled.

plaintiff for 28*l.* 16*s.* as due to him from the defendant, she said she would pay it, if the plaintiff would allow 10*l.* which the defendant was entitled to deduct on the balance of the accounts between them. For the defendant it was objected, that the admission of his wife, as to a balance being due to the plaintiff, was not admissible in evidence; as the mere circumstance of her assisting in the shop, during the absence of her husband, was not evidence of such a general agency as would authorise her to settle an account between the plaintiff and her husband, which was altogether distinct and separate from her services in the shop.—The learned Baron, however, allowed the evidence to be received, and the jury accordingly found a verdict for the plaintiff.

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Mr. Serjeant *Taddy* now applied for a rule *nisi*, that this verdict might be set aside, and a new trial granted; on the ground that the admission of the defendant's wife had been improperly received in evidence. The general rule is, that declarations by a wife are admissible if they can be considered as referring to, or forming part of the *res gestæ*; but that they are not receivable if they are made at a different time, or in a separate transaction from that to which they immediately refer, or in which she may be directly employed with the consent and authority of her husband. In an *Anonymous* case (*a*), the declaration of the defendant's wife, that she had agreed to pay a certain sum *per week* for nursing a child, was held to be good evidence to charge the husband, it being a matter entrusted to, and usually transacted by women. So, in *Emerson v. Blonden* (*b*), the husband permitted his wife to act for him, in making an agreement and settling terms upon which certain lodgings were taken, and for the use and occupation of which the action was brought. Here, however,

(*a*) 1 Str. 527. ——— (*b*) 1 Esp. Rep. 142.

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 v.
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the declarations of the wife were made on her being applied to for payment of the plaintiff's demand, at a distinct and different time from her serving in the shop: and she admitted that a certain sum was due to him, after a dispute had taken place as to the balance of the account. She therefore could not be considered as the authorised agent of her husband, for this particular purpose. And in *Peto v. Hague (a)*, it was decided, that what is said by an agent, respecting a contract, in the course of his employment, is good evidence to affect his principal; but that the latter is not bound by what is said by him, on another occasion.

Lord Chief Justice DALLAS.—According to the rule established by modern practice, if a wife be constituted the agent of her husband, to act in his shop, and conduct the business of it, in his absence; if such an agency or authority be proved, whatever she may say as to dealings between her husband and third persons, may be admitted in evidence as against him. The distinction, however, turns on still broader grounds; for whatever contracts a wife may make with the authority and consent of her husband, she must be considered as his agent for that purpose; and consequently her representations are evidence against him, who has so permitted her to contract for him with third persons. Here, however, it has been said, that the declaration or admission of the wife, that she would pay the plaintiff's demand, if he would allow 10*l.* was made at a distinct and different time and out of the course of her employment, and on account of a separate transaction: but in *Biggs v. Lawrence (b)*, it was held, that, where an agent is employed to buy goods, his acknowledgment of having received them, is evidence of a delivery to the buyer; and it does not appear from that case, whe-

(a) 5 Esp. Rep. 134.—(b) 3 Term Rep. 454.

ther the agent's acknowledgment of having received the goods was made at the time of delivery or afterwards, or on what other occasion. And the case of *Emerson v. Blonden* is an express authority to shew, that, where a wife acts for her husband in any business or department, by his authority and with his assent, that he thereby adopts her acts, and must be bound by any admission or acknowledgment made by her respecting that business in which she has acted for him and by his authority. Here, therefore, as the wife was in the habit of attending to, and conducting the business of, the shop, she might be considered as acting within the scope of her authority, when she offered to settle the plaintiff's demand, which was for goods furnished to her husband on account of the shop.

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Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—In the West of England, the business of retail shops is most commonly carried on by the wives of the occupiers; and any admission made by them on account of goods furnished to the shop, are receivable in evidence as against their husbands. The case of *White v. Cuyler (a)*, appears to me to be far stronger than the present; where, in an action of *assumpsit* by a servant for the recovery of wages, the plaintiff was allowed to give in evidence a deed executed by the wife of the defendant, at the time of the hiring; which, though void as a deed, was admitted in order to shew the terms of the contract.

Rule refused (*b*).

(a) 6 Term Rep. 176.—(b) See *Anderson v. Sanderson*, 2 Stark. N. P. C. 204; S. C. Holt, N. P. C. 591.

1823.

*Saturday,
April 19th.*

LANCHESTER v. TRICKER.

Where several parishioners attended at a vestrymeeting, and signed resolutions authorising two churchwardens to repair the tower of the church, and they neglected to make a prospective rate for raising money necessary for the completion of such repairs, and the plaintiff alone paid the persons employed to make them, and sued the defendant, as his co-churchwarden, to recover a moiety of the sums so expended;—Held, that he could not support a plea in abatement stating the non-joinder of those parishioners who had signed the resolutions, as they only acted in their character of vestrymen, without any intention of becoming personally or individually liable.

THIS was an action of *assumpsit* for money paid by the plaintiff to the defendant's use. The defendant pleaded in abatement, that the promises in the declaration mentioned, were made by him jointly with twenty-six other persons therein named, and not by the defendant alone; on which issue was joined.—At the trial, before Mr. Baron Garrow, at the last assizes for *Suffolk*, it appeared that, on the 13th *April*, 1811, the plaintiff and defendant were appointed churchwardens of the parish of *St. James*, in the borough of *Bury St. Edmonds*; and that the tower of the church being in a dilapidated state, and in need of repair, they summoned a meeting of the inhabitants of the parish, which was held at a vestry, on the 8th of *July* in that year; when it was ordered, that the plaintiff and defendant, as such churchwardens, should be authorised to put a new roof on the tower; which order or resolution was signed by them as well as by twenty-four other parishioners.—At another vestry, summoned by the plaintiff and defendant, on the 1st *August*, 1811, a plan or model as to the repair of the tower was approved of by them and a majority of the other parishioners then present (*viz.* fifteen); who resolved that one *James Thompson* should put a new roof on the tower, according to the model produced, to be valued by two builders at its completion; and that the plaintiff and defendant, as such churchwardens, should be requested to employ such persons as they might think competent to estimate the injury done to the tower, and to employ such other assistants as they should think proper and necessary to repair it.—The plaintiff and defendant, under the sanction and in pursuance of those resolutions, employed several persons to make the repairs; and after they were completed, and the expences ascertained, a vestry-meeting of the parish was held on the

11th *January*, 1812, at which it was ordered that a rate should be made of four shillings in the pound, amounting in the whole to 807*l.* 14*s.*, upon all the occupiers of lands and houses within the parish, to reimburse the plaintiff and defendant the monies expended by them in repairing the church, and other expences incident to their office of churchwardens; which order was signed by the plaintiff and several other of the parishioners.—The rate was made by the plaintiff and other parishioners on the 14th *February* following, and resisted by the defendant and others; an appeal was afterwards entered against it and allowed, and the rate was accordingly quashed.—The plaintiff having been afterwards sued by the several persons who had done the repairs, and who obtained verdicts and took out executions against him; he filed a bill in Equity, praying that an account might be taken of all sums paid by him, and to which he had become liable for the repairs of the tower, and that a vestry might be called to make a rate for the payment thereof; which was dismissed with costs, on the ground that Equity could not decree a rate to be made to reimburse a former churchwarden, monies laid out by him whilst in office in pursuance of a vestry order (a); and the Vice-Chancellor there said, that, (b) “In the case of the *King v. The Chapel-wardens of Bradford* (c), it was established, that no church rate could be legally made for the reimbursement of a churchwarden, because that would be to shift the burthen from the parishioners at the time, to future parishioners. That a Court of Equity must equally follow the Law; and that it could be no ground of relief in the former Court, that a party had failed to use legal diligence.”—The plaintiff then brought the present action against the defendant, as such co-churchwarden, for the amount of the moiety of the bills paid by him for the re-

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v.
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(a) See *Lanchester v. Thompson and others*, 5 Madd. 5.—(b) *Id.* 11.—(c) 12 East, 556.

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LANCHASTER
v.
TRICKER.

pairs of the tower, and the jury found a verdict for him accordingly.

Mr. Serjeant *Frere* now applied for a rule nisi that this verdict might be set aside, and a verdict entered for the defendant instead thereof, or that a new trial might be granted, on the ground that the persons named in the defendant's plea being the parishioners who had signed the vestry orders or resolutions jointly with him, they must be bound by such signature, and were equally liable to contribute to the payment of the expences incurred in the repair of the tower. Although, in the case of the *King v. The Chapel-wardens of Bradford*, it was decided that a rate to reimburse churchwardens such sums as they had expended, or might thereafter expend, on a parish church, would be bad on the face of it, as in part retrospective; and Lord *Ellenborough* there said, that (a) "The regular way is for the churchwardens to raise the money before hand by a rate made in the regular form for the repairs of the church, in order that the money might be paid by the existing inhabitants at the time, on whom the burthen ought properly to fall:" yet here, as between the parties actually present at the vestry meetings, and joining in signing the orders for the repairs, they were in justice bound to contribute their several proportions of the expences, which renders this case wholly distinguishable from the *King v. The Chapel-wardens of Bradford*, which merely established that no claim could be set up by the plaintiff as against the parishioners at large.

But, *Per Curiam*—If the doctrine contended for were sanctioned, it would have the effect of rendering every parishioner liable, in which case it would be necessary that all should be joined in the action. The persons who attended and signed the orders of vestry acted merely as

(a) 12 East, 558.

vestry-men, and affixed their signatures in that character only, without any intention to render themselves individually or personally liable.—It is quite clear that from the course of proceedings which have been adopted by the plaintiff and defendant, as churchwardens, that they can have no legal demand on the parishioners collectively; and, as they ordered these repairs jointly in that character, they are jointly liable to pay for them; and as it appears that the plaintiff has discharged the whole of the expences attending them, he has a right to call on the defendant for his proportion or contribution of the sums so expended.

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v.
TRIGGER.

Rule refused.

—◆—
SNAPE and Wife v. DOBBS.

Saturday,
April 19th.

THIS was an action of account. The second count of the declaration alleged that the defendant, after the intermarriage of the plaintiff, *Mary Snape*, was bailiff to both the plaintiffs, in right of the said *Mary*, of one undivided moiety or share of a certain fishery, situate in the parish of *Kings-Norton*, in the county of *Worcester*, and that the defendant, as such bailiff, took and received the fish being in, and the profits arising from the fishery, to render a reasonable account thereof to the plaintiffs, in right of the said *Mary*, when he should be thereunto requested:—Breach, that although the defendant was requested by the plaintiffs so to do, he had not as yet rendered a reasonable account to either of them of the fish and profits so taken and received by him, but that he wholly refused and neglected so to do.—The defendant pleaded *first*, that he never was bailiff to the plain-

Where the plaintiff and defendant had separate interests in two pieces of land, over which a reservoir was made, under the Birmingham Canal Navigation Act, the 11th sect. of which provided, "that it should be lawful for the owner or owners of the lands on which any such reservoir should be made, to let all the water out of such reservoir once in seven

years, for the purpose of taking the fish therein;" and the 78th section provided, that the owners of all lands through which the canal should be made, should be entitled to the right of fishery in so much of the canal as should be made over or through their lands or grounds respectively:—Held, that as the plaintiff and defendant had only a several right of fishing in the water over his own land, they were not tenants in common of the fish, by virtue of the 11th section; but that when the water in the reservoir was drawn off, each was entitled to the fish which might be left and taken on his own soil.

1823.
 SNARE
 v.
 DORRIS.

tiffs, in right of the said *Mary*, of the said moiety or share of the fishery, nor ever took or received the fish being in, or the profits arising from the same; and, *lastly*, that he had fully accounted with the plaintiffs: on both which pleas issue was joined.—At the trial, before Mr. Serjeant *Bosanquet*, who presided for Mr. Justice *Richardson*, at the last assizes at *Worcester*, it appeared that the plaintiffs and defendant became separately possessed of two distinct lots or pieces of land, by purchase from the Honorable Mr. *Hewitt*, containing about four acres and a half each; the whole of which, the Company of the Proprietors of the *Worcester and Birmingham Canal Navigation* afterwards converted into a reservoir, by virtue of the statute 31 *Geo.* 3, c. 59 (a). That the reservoir having been completed more than seven years, the defendant, in the month of *November*, 1821, after having given notice to the plaintiffs, let off the water from the reservoir; and the deepest part of it being on the land that lately belonged to the defendant, nearly the whole of the fish naturally congregated and were taken there; all of which, consisting of nearly eight hundred pounds weight, the defendant claimed as belonging to him, although the plaintiffs insisted that they were entitled to a moiety; and for the recovery of the value of which the present action was brought.—For the plaintiffs it was contended, that they were tenants in common with the defendant, of the fishery in question, by virtue of the 11th section of the statute (b); but the learned Serjeant was of

(a) By which it is enacted, that, “for the security of the owners and occupiers of mills on the rivers *Arrow* and *Rea*, the company of proprietors should, and were thereby required, at their own expense immediately after the making of the said intended canal over the river *Arrow*, to make and complete the reservoirs as therein mentioned, and, *inter alia*, the reservoir in question on the estate of the Hon. Mr. *Hewitt*, then in the occupation of the plaintiffs and defendant, covering nine acres of land.”

(b) By which it was provided, that “it should be lawful for the owner or owners of the lands on which any such reservoir should be made, to let all the water out of such reservoir once in every seven years from the time of making such reservoir, for the purpose of taking the fish therein; the water to be so taken out in the month of *November*, and at no other time.”

opinion, that they had only a several and separate interest, and that each party was entitled to the fish which might be left on his own land when the reservoir was exhausted. He also thought that the 11th section could not alter the nature of the property, or control the 78th (a), which gave to each owner a several right of fishing on his own land, and he accordingly directed a nonsuit.

1823.
SHAFER
v.
DOBBINS.

Mr. Serjeant *Peake* now applied for a rule *nisi*, that this nonsuit might be set aside, and a verdict entered for the plaintiffs, or a new trial granted; on the ground that, although the plaintiffs and defendant were not, in point of law, tenants in common of the land, yet, that from the very nature of the case, they must be considered as tenants in common of the fishery, when the water was drawn off at the end of every seven years. They had a right in common between them, as there could be no division of the water contained in the reservoir, and it was the manifest intention of the Legislature that they should have such an interest by the septennial exhaustion of the reservoir, for the purpose of taking the fish, as was provided for by the 11th section of the statute. Although there is no case expressly in point, yet Lord Chief Justice *Holt*, in *Waterman v. Soper* (b), is reported to have ruled, that if A. plants a tree upon the extremest limits of his land, and the tree, growing, extend its root into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows into the land of A., though

(a) By which it was provided, that the owner or owners of all lands or grounds (except lords of manors) through which the canal should be made, should have, and be entitled to the right of fishery of and in so much of the canal, reservoirs, trenches, and sluices, as should be made, in, over, or through, his, her, or their lands or grounds respectively; so as in the use and exercise of the said right of fishery, the canal, reservoirs, &c. should not be prejudiced or obstructed, or any water drained or exhausted from or out of the canal, reservoirs, trenches, or sluices, &c.—(b) 1 *Ld. Raym.* 737.

1823.
 SNARE
 v.
 DOBBS.

the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A." So here, as the fish were in a continual state of locomotion, and would naturally resort to the deepest part of the reservoir when the water was drawn off, the fishery must be put on the footing of a tenancy in common; as otherwise, each party could not have his fair share of the fish which might be taken at the times appointed for the exhaustion of the reservoir.

Mr. Serjeant *Bosanquet* observed, that the only question at the trial was, whether there was a tenancy in common of the fish that might be found in the reservoir when the water was drawn off. That it was admitted that the plaintiffs had only a several right as to fishing with a line or net under the 78th section; but it was insisted that a tenancy in common arose once in seven years, by implication, and according to the 11th section of the statute. It appeared that the land on which the reservoir was made, was originally divided by a small stream; that he therefore thought that each of the parties was entitled *ad medium fish*; and that as the land was held in severalty, so the right of fishery must be taken to be in severalty also; and more particularly so, as the 78th section gave a distinct and separate right of fishery, which could not be altered when the water was drawn off.

The Court concurred in this opinion, and unanimously held, that the nonsuit was perfectly correct, as each of the parties had a several right of fishing in the water over his own land; and that, when the reservoir was exhausted, each must take his chance of the fish which might be left and taken on his own soil.

Rule refused.

1828.

SUTTON, Bart. v. WAITE, Gent.

Saturday,
April 19th.

THIS was an action on the case, brought by the plaintiff, as late Sheriff of the county of *Lincoln*, against the defendant, for neglect of duty, as his replevin clerk. At the trial, before Mr. Justice *Park*, at the last assizes for *Lincoln*, it appeared that an action had been brought against the plaintiff as such Sheriff, for not having taken sufficient pledges on a replevin bond, and in which the avowant, who brought the action, obtained a verdict. The attesting witness to the bond proved the execution of it by the sureties, and stated that one of them resided in a small town, in the neighbourhood of *Boston*, and that the other was a grazier in a considerable way of business, and of good general reputation, and that the stock on his farm, at the time the bond was taken, was worth between 800*l.* and 1000*l.* That the sureties lived at a distance from each other, and out of the bailiwick of the Sheriff.—It did not appear that the defendant had made any inquiry himself as to the responsibility of the sureties, but the learned Judge being of opinion that it was not necessarily incumbent on him to do so, and as it was proved by the attesting witness that one of them was at all events apparently responsible, the jury found a verdict for the defendant.

Mr. Serjeant *Lens* now applied for a rule *nisi*, that this verdict might be set aside, and a verdict entered for the plaintiff instead thereof, or a new trial granted; and submitted, that as a verdict had been found against the latter, as Sheriff, for having taken insufficient pledges to the bond, the responsibility of whom, it was the duty of the defendant, as his officer, to have inquired into, before it was ex-

Where an avowant in replevin obtained a verdict against the sheriff for having taken insufficient pledges on a replevin bond, which had been taken by his replevin clerk, against whom he brought an action for negligence, and the attesting witness to the bond proved that the sureties did not reside within the bailiwick of the sheriff, and that one of them occupied a farm well stocked at the time the bond was executed:—Held, that such clerk was not answerable, as it was not incumbent on him to make personal inquiries as to the responsibility of the sureties, if they are apparently responsible, it is sufficient; and it seems that when they reside out of the bailiwick of the sheriff, by

whom the bond is taken, it is necessary to search the sheriff's office where they do reside, to ascertain whether any process had been sued out against them, before the bond is taken.

1823.
 SUTTON
 v.
 WAITE.

ecuted, he was entitled to be indemnified by the latter, who was consequently liable in this action; and more particularly so, as it did not appear at the trial, that he had made any inquiry himself respecting such sureties, but confided entirely to the person who attested the execution of the bond, and who in point of fact recommended them to the defendant. Although, in strictness, a Sheriff is not responsible at all events; still, he should take reasonable means to ascertain the character and solvency of the parties about to execute the bond, or make such inquiries as to satisfy himself of their responsibility. In *Saunders v. Darling (a)*, it was held, that, in an action against the Sheriff, some evidence must be given by the plaintiff, of the insufficiency of the pledges or sureties, but very slight evidence is sufficient to throw the proof on the Sheriff, for the sureties are known to him, and he is to take care that they are sufficient. Here, however, the defendant took no such step, nor did he make any personal inquiries; and if he had even made inquiries in the neighbourhood, he would have ascertained that the sureties were not substantial persons, or men of property; and as they did not reside within the bailiwick of the Sheriff, they might have been objected to in the first instance, or, at all events, should not have been allowed to execute the bond until the defendant was perfectly satisfied that they were sufficiently responsible by the general reputation of the neighbourhood in which they lived.

Lord Chief Justice DALLAS.—A case which involved the same question as the present, as to the liability of the Sheriff, was tried before me at *Guildhall*, at the sittings after the last Term, and I take the doctrine to be, that if a Sheriff has reason to be satisfied that the sureties are responsible, and of which he alone is to judge, he would be justified

in taking them as such: so, if a person known to the Sheriff, make inquiries as to the credit or reputation of a tradesman, and the value of his stock, and communicates the result of such inquiry to the Sheriff, if it be favourable, the latter need not make a personal inquiry. Here, it appears, that one of the sureties was a grazier, and had stock on his farm, at the time the bond was executed, of the value of 800*l.* or 1000*l.* and the attesting witness swore, that he considered him to be a person of property. The defendant, therefore, was justified in taking him on his general credit or reputation. At all events, it was a question, first, for the Sheriff, and afterwards for the jury to say, whether the defendant had conducted himself with proper caution. Besides, it does not appear that there were any documents in the Sheriff's office, in whose bailiwick the sureties resided, to impeach their solvency, or shew that they were not responsible at the time the bond was taken; and although I lately expressed an opinion, that in such a case the office should have been searched, to ascertain those facts, and whether any process had been issued against them; still here, I think, that the defendant caused a proper inquiry to be made, and more particularly so, as the attesting witness to the bond had informed him, that the sureties were respectable; and there was nothing to shew that he had attempted to mislead the defendant at the time they were taken.

1823.
SUTTON
v.
WAITE.

Mr. Justice PARK.—It appeared at the trial, that the defendant merely acted as replevin clerk to the sheriff, within a limited district, for which he received a remuneration of 4*l.* a-year only; and that he had not filled the situation of under-sheriff, and that one of the sureties was in the possession or occupation of a considerable estate, at the time the bond was taken. I relied on the case of *Hindle v. Blades* (a), where it was held, that if the sure-

(a) 1 Marsh 27; S. C. 5 Taunt. 225.

1893.
SUTTON
v.
WAITE.

ties were apparently responsible, it is sufficient to exonerate the Sheriff in an action against him. There, however, one, if not both the sureties were proved to have been bankrupts within two years before they became sureties, and Mr. Justice *Heath* there said, (a) "it would be too much to expect the Sheriff to make inquiries into the private affairs of the sureties," and I, accordingly, left it to the jury to consider whether the defendant in this case had made the proper and necessary inquiry. If he had made none, but had gone to the estate which one of the sureties occupied, there can be no question but that he would have been satisfied; and that of itself would have been sufficient. I do not accede to the doctrine laid down in *Saunders v. Darking*; and if the same evidence had been given in an action against the Sheriff, as in this case, I should have considered him to have done his duty, so as to exonerate him from any liability in having taken insufficient pledges.

Mr. Justice *Burrough* concurred.

Rule refused (b).

(a) 1 Marsh, 29.—(b) See *Scott v. Waithman*. 3 Stark. N. P. C. 168.

Monday,
April 21st.

SHERWIN v. SMITH.

By the Apothecaries' Act, (55 Geo. 3. c. 194, s. 14,) it is provided, that no person shall be admitted to an examination for a certificate to practise, unless he shall have served an apprenticeship, and shall produce testimonials of a sufficient medical education to the satisfaction of the Court of Examiners:—Held, that a certificate duly issued by that Court is conclusive evidence of those facts; and that in an action to recover the amount of an apothecary's bill, it is not incumbent on the plaintiff to prove that he has served an apprenticeship.

granted by the Court of Examiners constituted by that act; when it was objected for the defendant, that such certificate was not of itself sufficient evidence, but that it was incumbent on the plaintiff to prove that he had served a regular apprenticeship of five years, as required by the 14th and 15th sections of that statute (a). The learned Judge, however, overruled the objection, and the jury accordingly found a verdict for the plaintiff, but the point was reserved for the consideration of the Court.

1828.
SHERWIN
v.
SMITH.

Mr. Serjeant *Pell* now applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered; and submitted, that it was, at all events, incumbent on the plaintiff to have produced testimonials of a sufficient medical education at the trial, which, as well as the due service of an apprenticeship, should have been superadded to the certificate, and must consequently have formed essential parts of it, before the Court of Examiners would allow it to be granted.

But the Court held, that the certificate was of itself conclusive as to the apprenticeship, and that it was incumbent on the Court of Examiners to inquire into that fact before they allowed the certificate to be granted; if not, that they

(a) By which it is enacted, "That, after the 1st of August, 1815, it shall not be lawful for any person, (except persons then in practice as such), to practise as an apothecary, unless he shall have been examined by the Court of Examiners constituted by that act, or the major part of them, and has received a certificate of his being duly qualified to practise as such from the Court of Examiners:—Provided, that no person shall be admitted to any such examination for a certificate to practise, unless he shall have served an apprenticeship of not less than five years to an apothecary, and unless he shall produce testimonials to the satisfaction of the Court of Examiners of a sufficient medical education, and of a good moral conduct; and that no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to, or on, the 1st of August, 1815, or that he had obtained a certificate to practise as an apothecary from the Court of Examiners as aforesaid."

1823.
SHERWIN
v.
SMITH.

would be guilty of a breach of duty. That this Court must presume that the proceedings before them, and on which the plaintiff obtained his certificate, were *omnia rite acta*. They were authorised to grant a certificate on the examination of the party, and no person could be admitted to such examination unless he had served a regular apprenticeship, and could produce satisfactory testimonials of a sufficient medical education and moral conduct. It was imperative on the Court of Examiners to inquire into those facts before they granted the certificate, which is of itself conclusive, although they do not appear upon the face of it.

Rule refused (a).

(a) See *Wogan v. Somerville*, ante, Vol. I. 102; S. C. 7 Taunt. 401; *Apothecaries' Company v. Warburton*, 3 Barn. and Ald. 40; *Same v. Roby*, 5 Barn. and Ald. 949; S. C. 1 Dow. and Ry. 564.

Monday,
April 21st.

ATTERBURY v. FAIRMANNER.

Where, in an action on the warranty of a horse, the plaintiff obtained a verdict, the Court will not grant a new trial on the grounds that there was no known disease to constitute such an unsoundness as set up by the plaintiff, or that the defendant was taken by surprise, altho' the plaintiff, on application, had refused to inform him of the cause or nature of the unsoundness.

THIS was an action of *assumpsit* on the warranty of a horse. The defendant pleaded the general issue. At the trial, before Mr. Baron Garrow, at the last assizes at Bedford, there was conflicting testimony on both sides, but the jury found a verdict for the plaintiff.

Mr. Serjeant Taddy now applied for a *rule nisi*, that it might be set aside, and a new trial granted; on the ground that the defendant had been taken by surprise as to the species of unsoundness which had been set up by the plaintiff, viz. that the horse was chest-foundered. He now produced an affidavit of a most experienced veterinary surgeon, who stated that there was no such disease known to constitute an unsoundness. It was also sworn that the defendant, before the trial, applied to the plaintiff to know the nature or cause of the unsoundness; which he refused to give.

But, *Per Curiam*.—The plaintiff made out a *prima facie* case that the horse was not sound, and the defendant should have been prepared to meet or rebut it at the trial. The veterinary surgeon, who has since made the affidavit, might have been then examined, or the horse might have been previously shewn to him. At all events, it was peculiarly a question for the jury; and if the defendant had wished to ascertain the nature of the unsoundness, he should have taken out a summons for that purpose.

1823.
ATTORNEY
V.
FAIRMANNER.

Rule refused.

CHRISTIE v. WALKER, and four others.

Thursday.
April 24th.

IN this case, the five defendants being jointly indebted to the plaintiff for goods sold, he made an affidavit of debt against them all.—On the 4th of May, 1822, he sued out a bailable *capias* against the defendant *Walker* alone, returnable in one month of *Easter*, under which he was arrested, and put in and perfected bail in the last *Easter* Term. On the 11th of May following, a serviceable *capias* was issued against the other four defendants, returnable on the morrow of the *Ascension*, in which *Walker* was not named, and to which they duly appeared. The bail-piece named *Walker* only, but, in *Trinity* Term last, a declaration was delivered against all five of the defendants, which was held to be regular, as the object of the process was merely to bring them into Court, and as the plaintiff was not bound to declare until after an appearance by all (a). An application was afterwards made on behalf of the bail, that an *exoneretur* might be entered on the bail-piece,

Where the plaintiff had a joint cause of action against five defendants, all of whom were named in the affidavit to hold to bail, and a bailable *capias* was issued against one, under which he was arrested, and a bail-piece taken, in which he alone was named;—and serviceable process was afterwards sued out against the other four, who were not named in the bailable process; and a declaration was

delivered as against all; and the plaintiff proceeded against the bail on their recognizance, in which the name of the defendant who was arrested was alone inserted, and to which they pleaded several pleas; the Court allowed the recognizance to be amended by adding the names of the other four defendants; on the terms of payment of costs by the plaintiff, and allowing the bail to plead *de novo*.

(a) See Vol. VII. 301; S.C. 1 Bing. 48.

1829.
CHRISTIE
v.
WALKER.

which was moved for on the ground of a variance between the process and declaration, but which the Court refused, on the grounds that the plaintiff might sue out bailable process against one defendant, and serviceable against others; that four only could be included in one writ; that the bail-piece must agree with the writ under which the one defendant was arrested; and that the affidavit of debt corresponded with the declaration which had been delivered as against all (a).—An action of debt was afterwards commenced against the bail of *Walker*, on their recognizance, to which they pleaded, *First, nul tiel record* of the recognizance in the declaration mentioned. *Secondly*, that the plea mentioned in the recognizance, in the declaration set forth, was not a plea at the time of acknowledging the recognizance depending in this Court, against *Walker*, and the four other defendants. *Thirdly*, that the judgment in the declaration mentioned was not given for the plaintiff against *Walker*, in the plea in the recognizance mentioned: and, *Lastly, nul tiel record* of the judgment in the declaration mentioned.—The rule to plead several matters having been erroneously entitled as against *Walker* alone, instead of himself and the four other defendants, the plaintiff signed judgment as for want of a plea, which the Court ordered to be set aside, on the ground that such practice ought not to be encouraged (b). Under these circumstances, Mr. Serjeant *Bosanquet*, on a former day in this Term, obtained a rule *nisi*, that the entry on the roll of the recognizance of bail for the defendant *Walker*, might be amended by the insertion of the names of the other four defendants sued jointly with him. He submitted, that unless the amendment were allowed, the plaintiff would have a difficulty in proceeding against the bail on their recognizance, as *Walker* alone was named therein; and as the putting in bail was his act, and as in the *præcipe* sent to the officer it appeared as if he was the only

(a) See Vol. VII. 362; S. C. 1 Bing. 68.—(b) See Vol. VII. 599.

defendant; whereas, in point of fact, he was sued jointly with the four others, of whom no notice had been taken in the recognizance; he consequently could not sustain his action against the bail. He cited the cases of *Mann v. Calow* (a), and *Halliday v. Fitzpatrick* (b), to shew that a recognizance may be amended conformably to the form in which it ought to have been made out, or where there has been failure in the record, or a misnomer of the plaintiff, through a misprision of the officer.

1823.
CHRISTIE
v.
WALKER.

Mr. Serjeant *Pell* now shewed cause, and submitted that the Court could not allow the amendment as prayed for, as it would have the effect of entering a statement on the record contrary to the fact: for, at the time the bail-piece was taken with respect to *Walker*, no writ had been sued out against the other four defendants, the *capias* not having issued against them until after *Walker* had been arrested and put in bail. The proceedings, therefore, were previously complete as against him; and although all five of the defendants were named in the affidavit to hold to bail, that would not of itself supply other defects, as it merely indicated that the plaintiff had a joint cause of action against all. If the amendment were granted, it would appear on the face of the recognizance that all the defendants had been sued at the same time with *Walker*, but process had not even issued against the four, until after the writ on which the latter was arrested was returnable, and under which he had been obliged to procure bail. In *Holt v. Frank* (c), where, in a joint action against two, the recognizance of bail was by mistake drawn up as in an action against one only, the Court seems to have treated it as a nullity. At all events, the serviceable writ in this case against the four defendants, should have been sued out at the same time as the bailable *capias* under which *Walker* was

(a) 1 Taunt. 221.—(b) 4 Taunt. 875. But see *Tabrum v. Tenant*, 1 B&P. and Pul. 482.—(c) 1 Mas. and Selw. 199.

1823.
CHRISTIE
v.
WALKER.

arrested, in order to justify the amendment according to the fact; but that was not done, nor was the second writ issued until the first had been perfected. In *Venn v. Warner* (a), where there was a misnomer of the plaintiff's name in the recognizance through a mistake, the Court would not allow it to be amended after issue joined on *nul tiel record*; and, in *Bingham v. Dickie* (b), where there was a clerical error in the spelling of the plaintiff's name in the bail-piece, the Court would not allow it to be amended without the consent of the bail.

But, *Per Curiam*.—The affidavit to hold to bail sufficiently disclosed the plaintiff's cause of action; and all the five defendants were named therein, which clearly designated his intent to sue them all. We have already decided that the only object of process is to bring the defendants into Court; and that the names of four only, could, by the practice of this Court, be inserted in one writ. So, the plaintiff was not bound to arrest all the defendants; for he might sue out bailable process against one, and serviceable against the others, he having a joint cause of action against all. The reason he did not cause the process to be issued against the four, at the same time that the bailable *capias* was sued out against *Walker*, was, that he did not deem it prudent to proceed against them until the latter had been arrested. If the plaintiff had abandoned the original action, as against him, the case would have been different; but as amendments are generally favoured to effectuate justice, and as this case has been no less than three times before the Court previously to this application, we shall, by allowing the amendment of the recognizance, be not only acting in consistency with our former decisions, but it may be done according to truth and fact.—The rule, therefore, must be made

Absolute, on payment of costs.

(a) 3 Taunt. 263.—(b) 5 Taunt. 814.

Mr. Serjeant *Pell* then moved that the defendants' pleas to the recognizance might be withdrawn, and that they might be at liberty to plead *de novo*, which was accordingly granted (a).

1823.
CHRISTIE
v
WALKER.

(a) See 1 Taunt. 223.

WEATHERPEN v. LAIDLER.

Thursday,
April 24th.

THIS was an action of trover for nautical instruments and wearing apparel, and brought by the plaintiff, as second-mate of a vessel which had been on a voyage from this country to *Quebec* and back, against the defendant, as Captain of such vessel.—At the trial, before Lord Chief Justice *Dallas*, at *Guildhall*, at the first Sittings in this Term, the plaintiff proved, that the articles sought to be recovered, were in the possession or custody of the defendant, and that he had refused to deliver them up.—For the defendant, it was insisted that he had a right to detain them, as they were forfeited by an act of disobedience of orders by the plaintiff, in the course of the voyage. The first mate proved, that the defendant went on shore at the *Mauritius* with a passenger, and ordered the ship's boat to be sent for him in the evening; that the plaintiff and three other seamen were sent with the long-boat to take him on board, but that he returned in another boat, and that the plaintiff and the other seamen did not afterwards come back to the vessel.—His Lordship left it to the Jury to say, whether this was not such an act of disobedience by the plaintiff, as to warrant the defendant in detaining his property by way of forfeiture. They found in the affirmative, and accordingly gave a verdict for the defendant.

Where the second mate of a vessel was ordered, with three other seamen, to take the ship's-boat and convey the Captain on board, who had gone on shore at the *Mauritius*, and on their getting on shore they refused to return with him, but remained there all night, and he was obliged to get back to his ship in another boat, and redeem his own on the following morning; when such mate was taken before a Magistrate at the *Mauritius*, and committed to prison for a month:—Held, that this was such an act of disobedience, as to warrant the Captain to detain

Mr. Serjeant *Taddy* now applied for a rule *nisi* that this his property on board the vessel by way of forfeiture, and consequently that trover could not be maintained against the captain for such detention.

1883.

WEATHERPEN

LAWLER.

verdict might be set aside, and a verdict entered for the plaintiff instead thereof; or that a new trial might be granted; and submitted, that although the plaintiff might have forfeited his wages according to the clause in the ship's articles, entered into in pursuance of the statute 37 *Geo.* 3, c. 73 (a), which provides, "That twenty-four hours absence without leave shall be deemed a total desertion, and render the seamen and mariners liable to the forfeitures and penalties in the 2 *Geo.* 2, c. 36, and 37 *Geo.* 3;" still, that clause is confined to the forfeiture of wages only, and not of any goods such seamen may have on board the vessel. Besides, it is not a mere act of disobedience that will subject the party to a loss of wages; for, in the case of *Robinet v. The ship Exeter (b)*, Sir William Scott, in delivering his judgment, observed, that "neglect of duty, drunkenness, and disobedience, existing in a gross and extreme degree, were sufficient to deprive a seaman of his wages. But that the neglect of duty must be wilful, and amount to that degree of inattention, which might expose the ship to danger." So, by the statute 2 *Geo.* 2, c. 63, s. 3 (c), if a mariner deserts, he only forfeits his wages; and it cannot be contended for a moment, that one act of disobedience, in a case of this description, will render a party liable to a larger penalty, (*viz.* the forfeiture of his property), than if he had deserted, or refused to proceed on the voyage. In order to render him liable, the

(a) See the Schedule to that statute, where the form of the articles is set out, as required by the 11th sect.—(b) 2 Rob. Adm. Rep. 261.

(c) By which it is enacted, that in case any seaman or mariner shall desert, or refuse to proceed on the voyage, on board any ship or vessel bound to parts beyond the seas, or that shall desert from the ship or vessel to which he or they shall belong, in parts beyond the seas, after he or they shall have signed the contract or agreement as required by that statute, he or they shall forfeit to the owners of such ship or vessel, the wages which shall be due to him or them, at the time of his or their deserting from such ship or vessel, or obstinately refusing to proceed on such voyage.

act must be not only wilful, but amount to such a neglect of duty as might expose the ship to danger, which could not be the case here, as she was near the shore, and the defendant got on board the same evening in another boat.

1823.
WEATHERPEN
v.
LAIDLER.

Lord Chief Justice DALLAS.—The facts, as appeared in evidence at the trial, were these: The defendant, as Captain of the vessel in question, being on shore at the *Mauritius*, and intending to return to his ship, the first mate ordered the plaintiff, as second mate, and three other seamen, to take the ship's boat on shore, for the purpose of bringing back the defendant: on their receiving the order, they said they would never return again to the ship if they once got on shore, and the carpenter proved, that they had avowed their express intention not to return with the Captain. They went on shore, but refused to convey him to his ship, and he was eventually obliged to come on board in a strange boat, and to pay for his conveyance. The plaintiff, and the three others who accompanied him, staid on shore during the night, and, on the following morning, they were taken before a Magistrate, who ordered them to be committed to prison for disobedience of orders, and they were accordingly kept in custody for one month. It is to be observed, that the boat in which the Captain should have been brought back to the ship, was not returned during the night, but the defendant was obliged to redeem it on the following morning.—An objection was taken at the trial, as to the nature of the proceedings which had taken place before the Magistrate, and it was insisted, that, as they must have been in writing, attested copies of them should have been produced: The cause, however, turned on the ground of disobedience. I entertained no doubt whatever but that it amounted to a disobedience of the defendant's orders by the plaintiff, for he not only refused to convey him on board his own ship, but he himself remained on shore all night. As

1823.
WEATHERPEN
v.
LAIDLER.

to the distinction which has been raised, with respect to the degree of the disobedience, I cannot conceive a stronger act than this; and I, therefore, see no reason to alter the opinion I formed at the trial.

Mr. Justice PARK.—There seems to me to be no foundation whatever to disturb this verdict. The ship's articles, under which the plaintiff incurred a forfeiture, are so far from being illegal, that they tend in the greatest degree to the good management and discipline of a ship. What can be a greater act of disobedience, than that exercised by the plaintiff? He not only took away the ship's boat, and kept it on shore all night, but would not allow the Captain to go on board, although he was desirous of so doing.

Mr. Justice BURROUGH.—It is important, that the articles of a ship should be strictly observed, and the plaintiff has been guilty of a manifest infringement of them. It may fairly be inferred, that he never intended to return to the ship again, and on the following morning he was committed to prison by the Magistrate before whom he was taken, for disobedience of orders.

Rule refused (a).

(a) See Holt on Shipping, Vol. I. p. 452.

Friday,
April 25th.

WHITFIELD v. JAMES.

Where, on the taxation of an attorney's bill, less than one-sixth part was taken off by the Prothonotary, by which he was entitled to the costs of the taxation:—Held, that he ought to have applied for them at the time, and that he could not afterwards have them allowed on motion;—the costs, as taxed, having been paid by his client, and an account between them settled and adjusted.

MR. Serjeant *Peake*, on a former day in this Term, had obtained a rule *nisi*, that it might be referred to one of the

Prothonotaries to tax the defendant's attorney his costs in this cause, occasioned by the defendant's taxation of his bill, and that he should pay such attorney the amount of such costs when so taxed;—less than one-sixth part of the bill having been taken off by the Prothonotary on the taxation of the same (a).—It appeared that the amount of the bill was 68*l.* 11*s.* 6*d.* and that 5*l.* 1*s.* 8*d.* only had been deducted by the Prothonotary.

1823.
WHITFIELD
v.
JAMES.

Mr. Serjeant *Pell* now shewed cause, on an affidavit which stated, that the defendant had caused his attorney's bill to be taxed in *February* last, that the latter attended before the Prothonotary, but did not demand his costs at the time, and that after the taxation the defendant paid the attorney what remained due to him after the settlement of his bill, on which, all accounts between them were closed.

Mr. Serjeant *Peake*, in support of the rule, submitted, that the defendant was, at all events, liable to pay the costs as prayed for, and he referred to the case of *Hindle v. Shackleton* (b), where, upon taxation of a bill of costs, a sum was deducted less than one-sixth of the amount of the bill delivered, including some specific disbursements in the cause; the Court ordered the client to pay the costs of the taxation.

Mr. Prothonotary *Ray* observed, that at the taxation before him, no allusion whatever was made by the defendant's attorney as to the payment of costs: if there had been, he should have recommended the defendant to pay them, as it was his uniform practice so to do; and more particularly so, as they would only have amounted to ten shillings, as the parties attended for the purpose of taxation on the first summons.

(a) See the statute 2 *Geo.* 2, c. 23, s. 23.—(b) 1 *Taunt.* 536.

1833.
WHITFIELD
v.
JAMES.

Lord Chief Justice DALLAS.—It appears to me that the defendant's attorney conducted himself most properly throughout the progress of the cause, and did not overcharge his client in the bill delivered to him, as five pounds only were deducted. The question then is, whether, under the circumstances, he should have made this application to the Court. If he had meant to have insisted on the costs attending the taxation, he should have done so before the Prothonotary; and it appears that if he had then preferred his claim, they would have been allowed as a matter of course; but nothing was then said respecting them: and the costs, as taxed, were afterwards paid by the defendant to his attorney, and all accounts settled between them. That settlement appears to me to be a waiver of the present application; and more particularly so, as the sum sought to be recovered is of so trifling a nature.

Mr. Justice BURROUGH concurring—

Rule discharged (a).

(a) Mr. Justice Park was absent, at the Admiralty Sessions, at the Old Bailey.

Saturday,
April 26th.

TOOTH, Demandant; BODDINGTON, Tenant.

A count in a writ of right cannot be amended by substituting an allegation that "the demandant was seised of premises held by him at the will of the Lord, according to the custom of a manor," instead of an averment that "he was seised in his demesne as of fee and right:" and where a Judge, at chambers, made an order for such an amendment, the Court directed it to be discharged.

THIS was a proceeding in the nature of a writ of right.—Mr. Serjeant *Bosanquet*, on a former day in this Term, obtained a rule nisi, that an order made by Mr. Justice Burrough in the last vacation, enabling the demandant to amend his count, might be discharged, or the proceedings stayed. It appeared that the order was obtained after pleaded and writ of view served, and that the demandant, in his count, had originally stated that he was seised of

It appeared that the order was obtained after pleaded and writ of view served, and that the demandant, in his count, had originally stated that he was seised of

the tenements demanded in his demesne as of fee and right, and by the amendment it was stated, "that he was seised of the tenements and premises, the same being within a certain manor, and held by him as of his fee and right, at the will of the lord, according to the custom of the said manor." This, the learned Serjeant submitted, altogether altered the nature of the demand; and he cited the cases of *Dumsey v. Hughes* (a), and *Charlwood v. Morgan* (b), to shew, that it is an established rule not to amend a count in a writ of right, unless on very particular grounds; and that it was only *possible* that a case might be brought before the Court in which it might be allowed.

1823.
Toorn
v.
Bodderston.

Mr. Serjeant *Laves* now shewed cause, and admitted, that, although an amendment in a proceeding of this nature was not allowed as a matter of course, still, that it was in the discretion of a Judge to grant it; and that it was generally done on the terms of giving the tenant an imparlance to plead to the amended count. At all events, as both parties acceded to the amendment when the order was made, it is conclusive; and more particularly so, as terms were imposed on each; and if the amendment will have the effect of making the count objectionable or bad on the face of it, the tenant may demur.

Mr. Serjeant *Bosanquet*, in support of the rule, submitted, that, if the amendment were allowed, it would completely alter the nature of the demandant's claim; and if the tenant were put to his demurrer, it would place him in a most perilous situation, and that he was entitled to an imparlance as a matter of course.

Mr. Justice BURROUGH observed, that, when the application was made to him, he told the parties that it would

(a) 3 Bos. and Pul. 453.—(b) 1 New Rep. 64.

1823.
 Toorn
 v.
 BODDINGTON.

answer no effectual purpose; but that had his attention been drawn to the cases of *Dumsday v. Hughes*, and *Charlwood v. Morgan*, he should not have granted the order:—And the Court being of opinion that those cases were decisive to shew that amendments in proceedings of this nature should scarcely ever be allowed, they ordered the rule for setting aside the order to be made

Absolute.

Saturday,
 April 26th.

BASS v. MAITLAND.

An attachment for contempt, in not paying money pursuant to the Prothonotary's *allocatur*, on demand made by a third person, who acted under a power of attorney, may be supported on an affidavit stating that he shewed the original rule and *allocatur* to the party charged, at the time of the demand; and it seems that it was not necessary to shew him the power of attorney.—*Sed Quere.*

MR. Serjeant *Frere* moved, that an attachment might issue against an attorney of this Court for contempt in non-payment of 117l. to the plaintiff, pursuant to the Prothonotary's *allocatur*.—He founded his motion on an affidavit, which stated, that a personal demand had been made on the former by a person named *Bliss*, who had a power of attorney from the plaintiff, authorising him to receive the above sum, which was still unpaid; and that *Bliss*, at the time of the demand, shewed the attorney the original rule and *allocatur*, as well as the power of attorney authorising *Bliss* to receive the money for the plaintiff.

Mr. Serjeant *Onslow* shewed cause, in the first instance, on an affidavit of the attorney, which stated, that the power of attorney was not produced or shewn to him at the time of the demand, although he requested to look at it, or have the contents read to him; nor did *Bliss* shew that he was authorised to make the demand on account of the plaintiff. This, the learned Serjeant submitted, he was bound to do; as, if he did not produce such authority, or satisfy the party charged that he acted under a legal power from the plaintiff to make the demand on his account; or if it should turn out that he was not duly authorised, such party

would be liable to pay the sum demanded over again to the plaintiff: and it is an established rule, that, where one person authorises another to act, or receive money on his account, such authority must be shewn to the party who demands to see it, in order to ascertain whether such third person is fully authorised to act or not.

1828.
BASS
v.
MAITLAND.

Lord Chief Justice DALLAS.—The party against whom this attachment is moved, does not deny the service of the rule, and the Prothonotary's *allocatur* thereon. On the other hand it is sworn that they were both shewn to him, as well as the power of attorney from the plaintiff, authorising *Bliss* to receive the money on his account. I am, therefore, of opinion, that enough was done to entitle the plaintiff to his attachment.

Mr. Justice BURROUGH.—It must be observed that the party charged is an attorney of this Court: he should, therefore, have shewn a plain and satisfactory cause why the attachment should not issue against him. It appears that *Bliss* had a power of attorney to receive the sum in question on account of the plaintiff, but he was not bound to produce it. The attorney does not deny having been served with the rule and *allocatur*, which I think was sufficient to charge him with an attachment.

But the Court, under the circumstances, ordered the attachment to remain in the office ten days (a).

(a) But see *Hartley v. Barlow*, 1 Chit. 229, where it was decided, that an attachment for a contempt, in not paying money pursuant to the Master's *allocatur*, cannot be supported on an affidavit, stating a demand of the money by a clerk, without shewing a power of attorney. See also, *Tidd's Practice* Vol. II. 7th edition, 868. *Jackson v. Clarke*, 1 M'Clelland, *Excheq. Rep.* 72.

1836.

Saturday,
April 26th.

GLASIER v. EVE and three others.

Where, in an action of trover, the plaintiff claimed under an assignment by bill of sale from the sheriff, on an execution issued by him against J. S. who afterwards became bankrupt, and the defendants, as his assignees, seized the goods by virtue of the commission, but did not defend the action as such, or were proved to have acted in that character at the trial; it seems that they must be considered as strangers; and consequently, that it was incumbent on the plaintiff to produce an examined copy of the judgment on which the writ of *fi. fa.* was grounded, as well as the writ itself, and the assignment to him from the sheriff.

THIS was an action of trover for live and dead stock. At the trial, before Mr. Baron *Graham*, at the last Summer Assizes at *Lincoln*, it appeared that the plaintiff had lent money to one *Bowmar*, who requiring further advances, the former procured two warrants of attorney, executed by *Bowmar* as a security for re-payment; but on default being made, judgment was entered up, and two writs of execution issued. After the sheriff had been in possession some time, *Bowmar* became bankrupt, and two of the defendants were chosen his assignees; and, conceiving that *Bowmar* and the plaintiff had been acting in collusion, they instructed the two other defendants, as the messenger and his assistant under the commission, to retake the cattle which had been levied under the executions issued on the judgments entered up on the warrants of attorney, which they accordingly seized, by virtue of the power vested in them under the commission. At the trial, the original warrants of attorney were produced from the judgment office, and their due execution proved, as well as the consideration for which they were given: the two writs of *fi. facias*, issued by virtue of the judgments which had been entered up on the warrants of attorney were also produced; and it was further proved that the sheriff, by virtue of such writs, took possession of *Bowmar's* cattle; and afterwards, and before the bankruptcy, made an assignment to the plaintiff under a bill of sale, which assignment was also produced. On an objection being raised by the defendants, that this proof was not sufficient, the learned Baron required the production of the warrants under which the officer had made the levy; but they were not in Court. He then required the plaintiff to produce examined copies of the judgments on which the ex-

ecutions were founded; but as he did not come prepared with them, and they could not be produced, he directed a nonsuit.

1822.
GLASGOW
v.
Burr.

Mr. Serjeant *Hullock*, in the course of the last *Michaelmas* Term, obtained a rule *nisi*, that this nonsuit might be set aside, and a new trial granted; and submitted, that it was sufficient for the plaintiff to produce and prove the writs under which the execution was levied, and the assignment from the sheriff to him, as that alone would give him a good title to maintain this action; for that even a vendee acquires a title in articles purchased by him at a sale under an execution, however the sheriff may be affected by such sale.

Mr. Serjeant *Vaughan* now shewed cause, and admitted that, although as between the plaintiff and the bankrupt, it would only have been necessary for the former to have produced the writs of *fi. facias* and the assignment to him from the sheriff, yet, as the present action was brought against the defendants, as assignees and messenger under the commission, who had taken possession of the bankrupt's property by virtue thereof, it was incumbent on the plaintiff to shew a good title in *omnibus*, and of which the judgments on which the writs were grounded formed a constituent and essential part. In *Martyn v. Podger* (a), it was decided, that sheriff's officers, who justify the seizure of goods under a writ of *fi. facias*, must produce and prove a copy of the judgment on which such writ issued; and, on *Lake v. Billers* (b) being there cited, which was an action of trespass against the sheriff for taking goods under a writ of *fi. fa.*, Lord Chief Justice *Holt* ruled, "that the defendant, though sheriff, ought to give in evidence a copy of the judgment; but that it would have been otherwise, if the trespass had been

(a) 5 Burr. 2651; S. C. 2 Sir W. Bl. 701.—(b) 1 Lord Raym. 733.

1823.
GLASIER
v.
EVE.

brought by the person against whom the *feri facias* issued." On which Lord *Mansfield* observed, that (a) "that case proved, that, as the action was brought by a stranger, the judgment must be proved, and that the general apprehension was, that it was necessary to produce a copy of the judgment;" and the rest of the Court concurred in that opinion. These cases are directly in point to shew, that in the present an examined copy of the judgments should have been produced and proved as against the defendants as assignees, although it might not be necessary as between the plaintiff and the bankrupt; and if it were incumbent on him to prove the writs under which the executions were sued out, so the judgments on which they were grounded formed a necessary part of his title, as they were, in point of fact, the basis on which it was founded.

[Mr. Justice *Burrough*.—Here, the plaintiff had obtained execution against *Bowmar* before his bankruptcy, and the defendants, as his assignees, laid claim to it afterwards; they must, therefore, stand in the same situation as the bankrupt himself; and the question is, whether they can require more than he could have done?]

Their names did not appear on the record as assignees, nor was it proved that they defended in that character. No notice was given them by the plaintiff to dispute their title; nor does it appear, from any part of the learned Baron's report, that they had acted as assignees, or were so considered at the trial; nor was any distinction then drawn as between the original parties to a suit and a stranger. The nonsuit, therefore, was perfectly correct; and even if the defendants were assignees, still, as the plaintiff's title was principally founded on the judgments, they should have been proved, unless the action had been

(a) 5 Burr, 2633; See, also, *Ackworth v. Kempe*, 1 Doug. 41.

brought against the sheriff, who was bound to act under the writs which had been delivered to him, and by virtue of which the executions had issued.

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GLASIER
v.
EVE.

Mr. Serjeant *Lens*, in support of the rule, produced affidavits to shew that the defendants were considered as assignees at the trial, although they were not expressly proved to have been so; and submitted, that the plaintiff had done all that he was bound or required to do, in making out a *prima facie* title against them; and that it was not necessary to dispute the principle as laid down in *Martyn v. Podger*, as there the plaintiff was a stranger to the execution, not being the party against whom it had issued. In that case, therefore, he must be taken to have stood on his own title; and the distinction was there drawn, that where the action is brought by a stranger, the judgment must be proved; but that it was otherwise if it were brought by the person against whom the writ of *fieri facias* was issued, as he must be supposed to be cognizant of the judgment. So here, as the defendants stood in the same situation as the bankrupt himself, against whom the executions issued, and claimed a title to his effects as acting in the character of his assignees, which effects had been previously assigned to the plaintiff under a bill of sale from the sheriff, they thereby identified themselves with the bankrupt. They might have shewn themselves to be strangers to him, but the stock was taken in execution as his, and the sheriff made an assignment to the plaintiff accordingly. It was therefore sufficient for the latter to prove the executions and assignment as against the bankrupt, as it would be a *prima facie* title against all persons but strangers, which the defendants could not be inferred to be, as they represented the bankrupt against whom the executions were sued out at the suit of the plaintiff previous to the bankruptcy; and no fraud was attempted to be set up as between him and the bankrupt.

1825.
GLASIER
v.
EVE.

Lord Chief Justice DALLAS.—If the defendants are not to be considered as assignees, there can be no doubt whatever on the subject; and if they did not defend the action as such, I am of opinion that the nonsuit was perfectly correct. Although the defendants might *prima facie* be taken to be assignees, still there is nothing to be collected from the report of the learned Baron who tried the cause, that they defended the action as such, or even that they had acted in that character. They must, therefore, be now considered as strangers; and if so, the plaintiff was bound to produce an examined copy of the judgments, on being called on for that purpose at the trial. On the ground, therefore, that the defendants must be considered as standing in the situation of strangers, I think the nonsuit ought to stand, unless the plaintiff will consent to go down to a new trial, on payment of costs.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—It appears to me, that even if the defendants had defended this action as assignees, the judgments should have been produced on being called for at the trial. It is true that the production and proof of a writ is sufficient in an action against a sheriff, but that does not extend to other persons; for a writ is issued by the order of the Court, under the authority of which the sheriff acts, and he is only justified in proceeding according to its direction. Here, however, the plaintiff claims under the judgments obtained against the bankrupt, to which the defendants may be considered perfect strangers; and more particularly so, as it does not appear on the face of the Judge's report whether they were assignees or not, nor were they proved to have acted as such at the trial. The plaintiff should have been prepared to complete his title *in omnibus*, by the production of examined copies of the judgment-roll on which the writs were grounded, and under which the executions were issued.

But the Court ultimately directed, that the judgment of nonsuit should stand, unless the plaintiff would consent to go down to a new trial on payment of costs, which they strongly recommended, and the rule was ordered to be drawn up accordingly.

1823.
GLASIER
v.
EVE.

WARD, Demandant; ALDERSHY, Tenant; WILSON and another, Vouchees.

Monday,
April 28th.

MR. Serjeant *Heywood* moved that this recovery might pass, notwithstanding an omission in the warrant of attorney, which was in the following terms: "The vouchees put in their place *S. P.* and *K. N.* jointly and severally, against *I. B.*, to gain or lose in a plea of land." The words "*their attornies*" before those of "jointly and severally," having been omitted by mistake. The learned Serjeant submitted, that although it was a rule that no amendment could be made in a warrant of attorney (*a*), still that those words might be omitted, as they might be considered as surplusage: and he referred to the form of a warrant of attorney in the Year Book, 3 Hen. 7, where the Prothonotary had certified the form to be as follows, viz. "*A. B.* (the vouchee), *posuit in loco suo T. B. versus —, petentem in placito terræ.*" So here, *S. P.* and *K. N.* were appointed attornies, although not specifically described as such.

A recovery may pass, although the words "*their attornies*" were omitted in the warrant of attorney given by two vouchees.

The Court were of opinion, that it was unnecessary to introduce the words (*their attornies*), as *S. P.* and *K. N.* were merely to be considered as appointed for the purpose of suffering the recovery, and not for any proceedings at law, and that they were therefore sufficiently described in the warrant of attorney.

Fiat (*b*).

(a) See 2 Marsh, 328. 6 Taunt. 692. — (b) See *Paltzer, Demandant; Alexander, Tenant; Stacy, Vouchee; — Leix, Demandant; Randall, Tenant; Grimes, Vouchee.* 8 Taunt. 164.

1823.

Monday,
April 28th.

UPTON v. CURTIS and LAWRENCE.

Where, in replevin by A. against B., the issue was, whether A. held under C. at a certain annual rent:—Held, that the latter was not a competent witness to prove the amount of such rent. Where, therefore, B., as landlord of C., distrained on the goods of A., as under-tenant to C.:—Held, that C. could not prove that the original tenancy of A. had expired, and that he had become tenant to C. at an increased rent.

THIS was an action of *replevin* for taking the plaintiff's goods.—The defendants avowed, that one *Thomas Pettman*, for two years next before and ending on the 6th of *April*, 1819, and from thence until, &c., was tenant to them, by virtue of a demise to him made, at the yearly rent of 298*l.* payable half-yearly; and that one year's rent being due from him to them on the said 6th of *April*, they well avowed the taking, &c. They also made cognizance, as bailiffs of the said *Thomas Pettman*, and averred that the plaintiff, for two years, ending on the 11th *October*, 1818, held the place in which, &c., as tenant to *Pettman*, under a demise from him to the plaintiff, at the yearly rent of 30*l.* payable at *Lady-day* and *Michaelmas* in each year; and that, because 20*l.* parcel of that rent, ending on the said 11th *October*, became due from the plaintiff to *Pettman*, the residue having been before paid, they well acknowledged the taking, &c. The pleas in bar traversed the demise as stated in the avowry and cognizance, and on which issue was joined (a). At the trial of the cause before Lord Chief Baron *Richards*, at the last Summer Assizes at *Maidstone*, it appeared that one *William Pettman* being seised in fee of certain premises situate in the parish of *Eastry*, in the county of *Kent*, demised them to the plaintiff on the 6th *April*, 1815, as a yearly tenant, at the annual rent of 20*l.* That *William Pettman*, on the 1st *December* in that year, demised the premises in question, then being in the occupation of the plaintiff,

(a) See the pleadings set out at length, *ante*, Vol. V. 201, where this cause came before the Court on demurrer, which was overruled, on the ground, that the material point in issue was raised between the parties, *viz.* whether *Thomas Pettman* held under the defendants, as stated by them in their avowry.

together with other premises, to his son *Thomas Pettman*, for a term of fourteen years, at the yearly rent of 298*l.*, payable half-yearly; and that, on the 20th *January*, 1816, *William Pettman* conveyed the whole of those premises, including those of the plaintiff, to the defendants, by way of mortgage in fee. That the interest on the mortgage not having been regularly paid to the defendants, and *William Pettman* having become embarrassed, the plaintiff, together with the other tenants in possession, were, in *January*, 1817, served with a notice, requiring them to pay the rents in future to the defendants, as mortgagees, which, under the terms of the original holding, were made payable to *William Pettman*. That the plaintiff, from the date of this notice, accordingly paid to the defendants' agent two years' rent, from the 6th *April*, 1817, to the 6th *April*, 1819, inclusive, by half-yearly payments, at the rate of 20*l. per annum*. That after the last payment, viz. in the month of *June* in that year, the plaintiff was called on by the defendants to pay them 20*l.* more, on the ground that the rent actually payable by him was at the rate of 30*l. per annum*, instead of 20*l.*; and they accordingly levied a distress for that sum, as being the balance of rent due to them on the 6th *April* preceding, viz. 5*l.* upon each of the four last half-years, he having paid at the rate of 20*l.* a-year instead of 30*l.* In order to prove that the plaintiff was liable to pay this increased rent, *Thomas Pettman* was called as a witness for the defendants, and proved, that previously to his accepting the lease of his father's estate, of which the premises occupied by the plaintiff formed a constituent part, the latter had received a notice to quit from his father, the original lessor, and afterwards had agreed to become tenant to the witness *Pettman* at the advanced rent of 30*l.* a-year, instead of 20*l.*;—when it was objected for the plaintiff that he was incompetent to prove that fact, on the ground that he was an interested witness; as, if the defendants should

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URTON
v.
CURTIS.

1822.
UPPON
v.
CURTIS.

succeed in the action, he (*Pettman*) would have less rent to pay them for the premises he himself held; and, further, that it would create in him a new character and interest, in respect of those premises which were in the plaintiff's occupation. It was also submitted, that the defendants could only recover on the cognizance under which the distress was taken, but which was ultimately abandoned on account of a variance in the dates of the days on which the rent was to be payable. The only question then being, whether the plaintiff was in possession of the premises in question at the rent of 20*l.* or 30*l.* a-year:—The Lord Chief Baron observed to the jury, that that question depended entirely on the testimony of *Thomas Pettman*, which had not been opposed or impeached, and he directed them to find a verdict for the defendants, if they considered his evidence to be satisfactory and well founded; they accordingly gave a verdict for the defendants, his Lordship reserving the question as to whether such evidence was admissible, for the consideration of the Court.

Mr. Serjeant *Lawes* having, in the last *Michaelmas* Term, accordingly obtained a rule nisi, that this verdict might be set aside and a new trial granted, on the grounds that *Thomas Pettman* was incompetent as a witness at the time he was called, as, in case of a judgment *de retorno habendo*, it would operate in his favour, or that, if the defendants did not succeed, he would be liable to the costs of the distress, as they made cognizance under him; and consequently, that he sought to establish his own title by shewing that the plaintiff's original tenancy had been determined, and a new one created at an increased rent:—

Mr. Serjeant *Taddy* now shewed cause, and submitted, that, under the circumstances, *Thomas Pettman* was a competent witness to prove that the plaintiff had agreed to pay him an advanced rent of 30*l.* a-year, instead of 20*l.*

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being the sum originally payable to his father; and the jury having found a verdict accordingly, it is conclusive, and cannot be disturbed. *Pettman* was no party to the record, nor was he interested in the event of the suit, as the verdict could not be used in evidence either for or against him. He stood in the intermediate character of landlord to the plaintiff, and tenant to the defendants. If the amount of the rent to be paid by the plaintiff should be increased through his testimony, yet the amount to be received by the defendants would be thereby diminished; and whatever sum the plaintiff might pay them would be consequently deducted from any claim or demand which *Pettman* the witness might have as against him. The principle laid down in the case of *Bent v. Baker* (a), is applicable to the present, viz. that if the proceedings in the cause cannot be used for a witness, he is competent, although he may entertain wishes on the subject, as that only goes to his credit and not to his competency. If the defendants obtained judgment, it could not be pleaded as a discharge as to *Pettman*, for he was not called on to prove the payment of the rent, but merely that the rent payable by the plaintiff to him was of the annual amount of 30*l.*; and if the defendants did not receive that sum from the plaintiff, it is quite clear that he would be liable to pay it to the witness, who consequently stood in the situation of a stakeholder; as whatever sums he might receive in his capacity of landlord as due to him from the plaintiff, he would have to pay over to the defendants in his character of tenant to them; he was a debtor as to the one, and a creditor as to the other.

Mr. Serjeant *Lawes*, in support of the rule, submitted, that the main question at the trial was, whether the tenancy of the plaintiff under *William Pettman* the original

(a) 6 Term Rep. 27.

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lessor, had been determined or not. *Thomas Pettman*, the witness, had a direct interest in proving the discontinuance of that tenancy, as the effect of his testimony would be, not only to increase the amount of the rent payable by the plaintiff, but to discharge the witness, *pro tanto*, from the rent payable by him to the defendants, and which he had covenanted to pay under the lease made to them as mortgagees. He was lessee to them, and if they were to succeed in this suit, it would discharge him from the amount of the rent said to be payable by the plaintiff, and a judgment of *de retorno habendo* would tend to operate as a payment. In *Bland v. Ansley* (a), which was an action of trespass against the sheriff, the question was, whether goods which had been taken in execution in a suit against *J. S.*, belonged to him or the plaintiff, and *J. S.* was held to be an incompetent witness for the defendant, to prove that the goods were his property, since he would have been discharged from his debt, in case a verdict had been found for the defendant; and Sir *James Mansfield* there said (b) "the witness was called to give evidence, the effect of which would be to pay his own debt with the plaintiff's goods." So, here, the effect of the testimony of *Pettman*, as to the distress levied on the plaintiff by the defendants, would be to diminish the *quantum* of rent due from the witness to the defendants under his lease, to the amount of the rent said to be payable to him from the plaintiff. In *Clarke v. Shee* (c), which was an action for money had and received, and brought to recover back money which had been entrusted to the plaintiff's servant for a special purpose, and paid by him in effecting illegal insurances, he was considered incompetent without a release. Here, *Pettman* had not been released, and he was therefore inadmissible as a witness when called at the trial. On these grounds,

(a) 2 New Rep. 331.—(b) *Id.* 332.—(c) Cowp. 199.

it is quite clear that he had an interest in the event of the suit, as he came to discharge part of his own rent; for, whatever amount the defendants might recover as against the plaintiff, to that amount the witness would be discharged. He had also a direct interest in shewing that the plaintiff's original tenancy had expired, and that he occupied under the witness at an increased rent, by virtue of an agreement subsequent to the original tenancy. Taking it in another view, he was clearly incompetent, as he came to support a demise in a cognizance in which it was alleged that the plaintiff held under him. He was, therefore, in point of substance a party to the record; and although the cognizance was abandoned on the ground of a variance in the dates, it did not restore his competency, so as to discharge any part of the rent due from him to the defendants under the lease of the 1st of December, 1815.

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Lord Chief Justice DALLAS.—The only question in this case is, whether *Thomas Pettman* had any and what interest in the event of the suit. This will not turn on the test, whether the verdict can be used in evidence, either for or against him. If the effect of his testimony was to discharge himself from the payment of any part of his rent to the defendants, or advance the plaintiff's, under a subsequent agreement made to the witness, it appears to me that he would clearly be interested in the event of this action. I therefore think, that, under the circumstances, he was improperly admitted as a witness, and, consequently, that the rule for a new trial must be made absolute.

Mr. Justice PARK.—It appears by the avowry, that *Pettman*, the witness, was tenant to the defendants at the yearly rent of 29*l*. If the plaintiff held under him at the extra rent of 30*l*. instead of 20*l*. the witness would have less rent to pay for what he himself held, and would only have been

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liable to the defendants for 268*l.* instead of 298*l.* The main question at the trial was, whether the plaintiff held and occupied the premises at the annual rent of 20*l.* or 30*l.* It appears to me that *Thomas Pettman* could not be entitled to prove this, as the plaintiff could only be liable to the payment of 30*l.* a-year, through his testimony. On general principles, therefore, I concur with my Lord Chief Justice in thinking that there must be a new trial, as *Pettman* was interested in proving that the plaintiff held under him at the rent of 30*l.* per annum, instead of the original rent of 20*l.*; and it is a fallacy to suppose that he would receive it from the plaintiff with one hand, and pay it over to the defendants with the other.

Mr. Justice BURROUGH. — By the defendants' succeeding in this action, *Thomas Pettman* would have less rent to pay in respect of the premises he occupied under them; and, in point of effect, his testimony would go to diminish the payment of his own rent. The verdict for the defendants was founded on the plaintiff's holding under *Pettman*, the witness, and that rent was due from the plaintiff to him: and he alone was called to prove the amount of that rent. Evidence should have been produced *alimunde*, to show what rent had been paid by the plaintiff to *Pettman*. The defendants, in their avowry, alleged that one year's rent, amounting to 298*l.*, was in arrear from *Pettman* as tenant to them. If he proved that the plaintiff held part of the premises under him at the rent of 30*l.*, it would have been a discharge *quoad* that sum as against the defendants.

Rule absolute for a new trial (a).

(a) See *Buster v. Watts*, 1 Barn. and Cres. 669; S. C. 3 Dow. and Ry. 106.

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Tuesday,
April 29th.

THIS was an action of *assumpsit* on a guarantie. The declaration stated, that the plaintiff had chartered a ship of his, called the *Robert of South Shields*, to one *Robert Livie*, for a voyage to *St. John's, New Brunswick*, and there to take on board, from the agents of *Livie*, a cargo of timber, and proceed therewith to *London*, and there to land and deliver the same to *Livie* or his assigns, he or they paying freight in manner following; viz. one-half in cash, and the remainder by an approved bill on *London* at four months' date. That the ship had proceeded to *St. John's*, and there taken on board from the agents of *Livie* such cargo as aforesaid, and had proceeded therewith to *London*, and delivered the same to *Livie*, and had earned her said freight, amounting to 98*l.* 9*s.* 2*d.*, and that *Livie* had paid the plaintiff in cash 49*l.* 4*s.* 7*d.*, for one-half of the said freight; and that the plaintiff was entitled to demand from him an approved bill for the residue; and that, thereupon, on the 6th *October*, 1821, in consideration of the premises, and that the plaintiff would take of *Livie*, in payment of the residue of the said freight, a bill of exchange drawn upon *Livie* on the 27th *September*, 1821, payable four months after date, for 49*l.* 4*s.* 7*d.*, and accepted by him; the defendant promised the plaintiff to be accountable to him for the amount of such acceptance, if the bill should not be paid when due. The plaintiff then averred, that he took the bill, and that it was dishonoured, and that the defendant in consequence became liable to pay. To this was added the common money counts. The defendant pleaded *non assumpsit*. At the trial, before Mr. Justice *Barrough* at *Guildhall*, at the Second Sittings in this Term, the plaintiff gave in evidence a guarantie, addressed to him by the defendant in the following words:—

Where the defendant signed and gave a guarantie to the plaintiff, stating that "the latter having chartered his ship to J. S., and that he having paid one-half the freight, and given the plaintiff his acceptance for the remaining half, at four months' date;" the defendant engaged to be accountable to the plaintiff for the amount of the said acceptance, should it not be paid when due:—Held, that the consideration for the defendant's promise or undertaking was sufficiently expressed on the face of such guarantie, so as to bind him within the 4th section of the statute of frauds.

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Mr. R. Pace, London, October 6th, 1821.

Sir,—Mr. *Livie* having chartered your ship *Robert* to bring a cargo of timber from *New Brunswick*, and the same being landed to the charterer; and he having paid you one-half of the freight, and given you his acceptance for the remaining half, at four months' date, I engage to be accountable to you for the amount of the said acceptance, should it not be paid when due, and remain, Sir,

Your's, &c. *James Marsh.*

It was also proved that this guarantie was given by the defendant at the express request of Mr. *Livie*, and in full confidence that his acceptance would be duly honoured when the bill should become due; and, under these circumstances, the jury found a verdict for the plaintiff: but the learned Judge reserved the question for the opinion of the Court, as to whether the consideration was sufficiently expressed on the face of the guarantie to enable the plaintiff to recover.

Mr. Serjeant *Vaughan* now applied for a rule *nisi*, that this verdict might be set aside and a nonsuit entered; and submitted, that there was no sufficient consideration for the defendant's promise appearing on the face of the instrument, so as to render it available within the 4th section of the statute of frauds. He submitted, that, if it had been set out in terms in the declaration, it was quite clear that the plaintiff would not have been entitled to recover; and although it was therein stated that one-half of the freight had been paid, yet it was alleged, that the plaintiff was entitled to an approved bill. He might have objected to the acceptance of *Livie*; and it does not appear that the defendant was present at the time the acceptance was given, or that the payment of part of the freight

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and the bill were to be made and given on the same day, or as forming part of the same transaction. It is altogether a different and distinct question as between the plaintiff and *Livie*, and the defendant; and as the former suspected the solvency of the charterer, he merely required him to give him an approved bill for the remainder of the freight, and there was no consideration resulting to the defendant from the acceptance given by him to the plaintiff, nor did any advantage or disadvantage arise or accrue to him from such acceptance. And in *Jenkins v. Reynolds* (a), where the defendant addressed a letter to the plaintiffs, in which he stated that they might "consider him as security on account of *J. S.* to the amount of 100*l.*" the Court, on the authority of the cases of *Wain v. Warblers* (b), and *Saunders v. Wakefield* (c), held, that it was not a sufficient memorandum to bind the defendant under the statute, the consideration or promise not having been expressed on the face of the letter. That case was decided since *Boehm v. Campbell* (d), where the consideration for the payment of the bill was couched in far stronger terms than in the present,

Lord Chief Justice DALLAS.—The defendant, in order to induce the plaintiff to give credit to a third person to whom he had chartered his vessel, became his surety, and gave the guarantie in question, and he now endeavours to rid himself of his obligation, by making a mere technical objection as to the form of the instrument by which he became bound. Similar objections have of late been frequently taken, and which have been carried to an extent of very nice refinement; but they are not to be construed beyond the strict exigency of each particular case. I am therefore of opinion, independently of the case of *Boehm v.*

(a) *Ante*, Vol. VI. 86; S. C. 3 Brod. & Bing. 14.—(b) 5 East, 10.—(c) 4 Barn. & Ald. 595.—(d) *Ante*, Vol. III. 15.

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ble to stop or govern his horse, in consequence of his being frightened and running away, and rendered ungovernable as aforesaid.—The plaintiff added a *similiter* to the first plea, and replied *de injuria* to the second; on which issue was joined.—At the trial, before Mr. Justice Park, at Guildhall, at the Sittings after the last Michaelmas Term, the plaintiff proved that his waggon, with four horses, were proceeding at a slow pace towards London, on the proper side of the road, which was from twenty-five to thirty feet wide, and as near the bank of the footpath as possible. That the defendant was coming from London in a gig; and driving a high-spirited young horse at the rate of from eight to ten miles an hour, and that he appeared to be driving carelessly and unskilfully. That one of the Greenwich stages was proceeding towards town, and in a line with the plaintiff's waggon. That the defendant, instead of passing the coach on the left-hand side of the road (there being ample room for him to do so), drove between the coach and the waggon. That his horse began to plunge; when the defendant, being alarmed, pulled the off-side rein instead of the near one. That the horse in consequence attempted to turn round, and ran one of the shafts of the gig into the body of the horse next the leader of the plaintiff's team, which died three days afterwards. It was also proved that the defendant's horse had a curb-bit on, but no curb-chain, and that he appeared to be incompetent to govern so high-couraged a horse.—The defendant, in order to establish his second plea, attempted to prove that the accident was unavoidable, and not to be attributed to any want of care or skill on his part; and a person he was driving stated, that, immediately before the accident happened, a butcher's cart crossed the road, turned round, and came in front of the defendant's horse, which started in consequence, and endeavoured to turn round and get back to London; that the defendant did the best he could to pull him up, and that he pulled the

proper rein to keep him on the right side of the road, although it might have appeared that he had pulled the wrong one.—For the plaintiff it was submitted, that the second plea could not be supported; as it was therein stated, that some person unknown to the defendant, drove a horse and cart *against* the defendant's chaise, and thereby frightened his horse; whereas it was proved that the cart was driven *towards*, and came in front of the defendant's horse.—The learned Judge was of opinion that the objection was well-founded, and that the plea could not be supported; and that, although the defendant might not have been guilty of an act of negligence or inadvertence, and although he might not have intended to do any injury, yet, that unless his plea of justification covered the whole of the case, it would not prevent the plaintiff from recovering in an action of trespass; that it was immaterial whether the defendant's horse was quiet or not; and that if the plaintiff's witnesses were to be believed, the action was properly brought; and that the defendant had established no legal defence to it; and the jury accordingly found a verdict for the plaintiff, damages 21*l.*, being the value of the horse.

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Mr. Serjeant *Pell*, in the last Term, obtained a rule nisi, that this verdict might be set aside, and a new trial granted, on the ground of a misdirection by the learned Judge; and submitted, that it should have been left to the jury to consider, whether the accident was unavoidable, or occasioned by the negligence or default of the defendant. If the injury complained of might be attributable to, or happened through unavoidable accident, and without any negligence or default on the part of the defendant, the action could not be sustained: as, if he had been driving a quiet horse, which took fright by having been acted on in consequence of the horse of a third person having come suddenly upon him; can it be said that in such a case the defendant would be liable to the plaintiff for an injury done to his

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horse, because the defendant's horse was the immediate cause of the injury? It is immaterial, for this purpose, whether the action was framed in trespass or *tort*, for the mere form of action would not prevent the defendant from going into the nature of his defence under the general issue, as it must depend altogether on the facts of the case, and not on the form of action. In *Leame v. Bray* (a), the defendant was driving on the wrong side of the road; and although a person may be answerable if he strike another accidentally, or if a soldier by firing his musket in exercising thereby accidentally hurts another (b), or a party receive an injury by another's swinging a stick, yet, in all these cases, the cause of action moves immediately from the person against whom it is brought, and does not turn on the intention of the party. Here, however, the defendant's horse was not under his control at the time of the accident; and as the plaintiff has sustained no direct or even indirect injury as moving from the defendant himself; and as no man can be deemed answerable for the consequence of an act occasioned by the improper conduct of a third person, the action (if any) should have been brought against the driver of the butcher's cart, as it was through him that the plaintiff's horse received the injury complained of, and he must be considered as the actor or *causa causans*: and the case of *Gibbons v. Pepper* (c), is precisely in point to shew, that if, by a sudden fright, a horse runs away with his rider, and runs against a man, it may be given in evidence under the general issue. Here, therefore, all the facts ought to have been left to the jury, and they should have found whether the accident was attributable to the improper driving of the defendant or not, and more especially so, as the plea of justification was in

(a) 3 East; 593.—(b) See Bull. Ni. Pri. 7th Edit. by Bridgman, 15 (a).—(c) 2 Salk. 637; S. C. 1 Lord Raym. 88; 4 Mod. 404.

point of fact proved, although not fully established at the trial.

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Mr. Serjeant *Vaughan* now shewed cause. In *Bacon's Abridgment* (a), it is laid down as a general rule, that a defendant in trespass cannot give any matter in evidence on the general issue, which amounts to a justification or excuse of the act complained of, or to a discharge of the trespass; because every such matter, as it does not amount to a denial of the right of action, ought to have been pleaded. Here, therefore, the defendant was bound to plead a special plea of justification, which he was not enabled to support by evidence at the trial. All the facts were before the jury, and they were fully competent to judge as to the degree of blame that might be attributable to the defendant. It has been said however, that if the plaintiff has any remedy, it is against the person who drove the butcher's cart, as he must be considered as the original aggressor or first cause of the accident; but it was not proved that any person drove a cart *against* the defendant's chaise, and it was admitted that he was driving a young and high-couraged horse, and without a curb-chain. As to whether the present action were maintainable or not, it is laid down (b), that "if one man has received injury from the voluntary act of another, trespass lies, although there was no design to injure, provided there was a neglect or want of due caution in the person who did the injury." So, the case of *Weaver v. Ward* (c), establishes the principle, that if the circumstance specially pleaded, do not make the act complained of, lawful, but only excusable, it is proper to plead this in excuse; and it is, in such case, necessary to show, not only that the act complained of was accidental, but likewise that it was not owing to neglect or want of

(a) Vol. V. 3d Edit. 214, tit. Trespass, H. — (b) *Id.* 163, tit. Trespass, D. 2. — (c) *Hob.* 134.

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due caution. At all events, a want of caution is attributable to the defendant, as he was driving a young horse in an unskilful manner, and without a curb; and it also appeared that he pulled the wrong rein, in consequence of which the injury was occasioned. In *Leame v. Bray*, the injury was purely accidental, as the defendant was driving in a dark night, and the parties were not able to see each other; and Mr. Justice *Grose* there said, that (a) "on looking into all the cases, from the Year Book, 21 Hen. 7, down to the latest decision on this subject, he found the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." So, here, the immediate injury to the plaintiff arose from an act done by the defendant himself, who, in passing, improperly drove between the plaintiff's waggon and the stage-coach, when there was sufficient room for him to have passed on the left-hand side of the coach, as he ought to have done; and in order to exonerate himself from this action, not even a colour of blame or want of caution should have been imputed to him.

Mr. Serjeant *Pell*, in support of the rule. The defence set up at the trial might have been gone into under the general issue, and the special plea of justification was altogether unnecessary, and was pleaded *ex abundanti cautela*; and although that plea was not proved in substance, yet the defendant was entitled to a verdict on the facts, which might be gone into under the plea of not guilty. No blame can, under the circumstances, be attributable to him, so as to entitle the plaintiff to sustain this action, although it is framed in trespass. In *Jennings v. Rundall* (b), it was decided, that a plaintiff could not convert an action founded on a contract into a *tort*, so as to charge an infant

(a) 3 East, 600.—(b) 8 Term Rep. 335.

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defendant. So, in trespass, the distinction has never turned either on the lawfulness or unlawfulness of the act from whence the injury happened, or the design of the party doing it, to commit an injury, but on the difference between injuries direct and immediate, or mediate and consequential. In *Leame v. Bray*, the action was deemed to be maintainable, as the defendant was on the wrong side of the road. So, in *Weaver v. Ward*, the defendant was exercising or skirmishing in an improper place. In an action for running down a ship, the question is either whether it might be attributed to accident or not, or whether it was wilful or negligent; and in a case of that description, it is immaterial to consider whether it was immediate or not. So, here, as the injury was purely accidental, the form of action makes no difference, and the defendant cannot be deemed liable to the consequences. In *Gibbons v. Pepper*, the defendant did not plead the general issue; and it appears from the report of that case in Lord *Raymond*, that the Court held, that he might have given his justification in evidence upon that plea. Here, therefore, from the whole of the facts as proved, it should have been left to the jury to say, whether there was a want of due attention or care on the part of the defendant, so as to render him answerable to the plaintiff, or whether he had been guilty of negligence or a want of skill. If the driver of the cart had been discovered, it is quite clear that he would have been liable to an action, according to the principle laid down in *Scott v. Shepherd (a)*, he being the prime mover, and to whom the accident was altogether attributable. No blame, therefore, can be imputed to the defendant; or, at all events, he is entitled to a new trial, as the question was not properly left to the jury.

Lord Chief Justice DALLAS.—I cannot but regret, from a variety of circumstances, that this case has come before

(a) 3 Wils. 403; S. C. 2 Sir W. Bl. 892.

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the Court in the shape it has. The question does not appear to me to turn on the form of the action, viz. whether trespass or case, or whether the injury committed was immediate or consequential; but it has been mainly contended that the defendant was entirely without fault, and that no blame whatever could be attached to him, and therefore that he could not be liable to the plaintiff under any form of action: but, from the facts as reported by the learned Judge who presided at the trial, I do not hesitate for a moment to say, that if they had gone to a jury, and, speaking for myself, if I had been one of them, I should have considered that the plaintiff was entitled to a verdict; and if I had presided, I should in all probability have so directed them.—The doctrine, as applicable to actions of this description, is, that no man can be excused of a trespass, unless he can justify that the act complained of arose entirely without his default; and if that justification be proved, it is an answer to the trespass. Here it does not appear from the evidence that the act complained of was attributable to accident alone, or that it arose wholly without the default of the defendant, or that no blame could be imputed to him. If a person drive a young horse through the public streets of *London*, and does not use a curb-chain, although he may not anticipate that any injury may arise from his so doing, he is still culpable. Here, however, there was evidence that the accident was occasioned by the default of the defendant. Indeed the weight of evidence was all that way, and yet the Court are now called on to grant a new trial. This, I think, would be against the justice of the case. The only ground on which I have entertained any doubt is, that it should have been left to the jury to consider whether the accident was unavoidable, or occasioned by any negligence or default on the part of the defendant. It does not appear that any request of that nature was made at the trial, but the objection is now raised for the first time. If such a sug-

gestion had been then made, I have no doubt but that my Brother *Park* would have taken the opinion of the jury upon it; in which case there would have been no ground whatever for the present application. As, therefore, it appears to me that the trespass was fully established, and the Judge was not called upon by the defendant's counsel to leave it to the jury to consider whether the accident were unavoidable or not; I think this verdict ought not to be disturbed, and, consequently, that a new trial cannot be granted.

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Mr. Justice BURROUGH.—The only question at the trial seems to have been, whether the form of action should have been trespass or case, or, in other words, whether the present was properly brought. At all events, the defendant should have been fully prepared to have established his plea of justification, and he failed to substantiate a most material part of it. The learned Judge thought that the case was sufficiently made out for the plaintiff to establish an act of trespass by the defendant, and it does not appear that any request was made to him to have the question submitted, as it is now contended it ought to have been, to the determination of the jury.

Mr. Justice PARK, declined giving any opinion; and the Court ordered the rule to be

Discharged (a).

(a) See *Underwood v. Hewson*, 1 Str. 596; *Flower v. Adam*, 2 Taunt. 514; *Bush v. Steinman*, 1 Bos. & Pul. 404; *Davis v. Saunders*, 2 Chit. Rep. 639.

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with precision, viz. whether by deed or by parol; and as it has not been done, an objection may be taken to the plaintiff's pleas in bar on general demurrer.

Mr. Justice PARK.—I am of opinion that the plaintiff should have amended. It must be observed, that the distress was taken for a certain beast. By the common law, an incorporeal hereditament cannot pass or be demised but by grant or deed. It has been said, however, that this was a demise by custom, which takes it out of the general rule. But it should have been stated with certainty and accuracy whether the custom was by deed or not, and more particularly so, as there could not have been a demise at common law without deed; and a Judge at *Nisi Prius* would enquire in the first instance whether the custom was by deed or not.

Mr. Justice BURROUGH.—It has been said that the custom is without deed. There is therefore a fallacy in the argument for the plaintiff, for if it be so, it amounts to nothing. At all events, it is imperfectly set out on the face of the record; the pleas therefore are bad in substance, and may be taken advantage of on a general demurrer. With respect to the doctrine cited from *Littleton* (a), it applies to the case of a feoffment, which may be without deed. If the parties were to go down to trial on the record as it now stands, the plaintiff might set up a deed or not as she might think proper, as it is merely averred, that the demise was according to custom: it therefore appears evident to me that it should have been stated whether such custom was by deed or not. It might have been very easy to have amended, by merely introducing the words "without deed," when the pleas would have been sufficiently certain. It is true, that in an action of debt for rent it is not necessary to set out

whether the demise was by deed or not; but here, the foundation of the custom should have appeared on the face of the record, and more particularly so, as the demise being of a thing in grant, nothing can excuse the omission of the profert of a deed but the allegation of a custom to demise without it.

Judgment for the defendants.

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LACKLAND, on the demise of DOWLING, 'v. BADLAND.

Friday,
May 2nd.

MR. Serjeant *Onslow* moved that final judgment might be signed in this cause, notwithstanding a defect in the notice at the foot of the declaration, which required the tenant in possession to appear in "eight days of St. Hilary," instead of "*Hilary Term*" generally. He submitted, that it was a mere clerical mistake, and could not tend to mislead the tenant. And he referred to an *Anonymous* case (a), where notice had been given as of a wrong Term, but the tenant was afterwards informed of the mistake, and it was held to be sufficient. So, in *Goodtitle d. Ranger v. Roe* (b), where a declaration was entitled of a wrong year, but the notice to appear in the following Term was dated correctly, it was held to be good. And in *Doe v. Greaves* (c), where the notice was in "*Trinity Term next*" instead of "*Hilary*," it was held not to vitiate the proceedings, but that judgment might nevertheless be entered up against the casual ejector. So, in an *Anonymous* case (d), where the declaration was of a Term not arrived, but the notice was correct, it was held to be an immaterial error.

Where, in the notice to appear at the foot of a declaration in ejectment, the tenant was required to appear in eight days of St. Hilary, instead as of Hilary Term generally, the Court would not allow final judgment to be signed, but left the party to bring a fresh action, as the notice was irregular and void.

Mr. Justice BURROUGH.—In all those cases, applications were made for judgment against the casual ejector; but here it appears that judgment has been obtained, and it is

(a) 2 Chit. Rep. 171.—(b) *Id.* 172.—(c) *Id. ibid.*—(d) *Id. ibid.*

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v.
BADLAND.

now sought to have it signed. The application, therefore, should have been made earlier, and the party was not bound to appear to an irregular notice. The only course of proceeding, therefore, will be to bring another ejectment; as the notice to appear might be considered as a nullity.

The learned Serjeant, therefore, took nothing by his motion.

Friday,
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FINDON v. HORTON.

On a motion for the discharge of a prisoner under the statute 48 Geo. 3, c. 123, s. 1, the Court required the record to be examined by the officer, to ascertain whether the judgment had been entered up for a less sum than 20*l.*, and whether the defendant had lain in prison twelve months by virtue of such judgment. The affidavit of the defendant as to these facts is not sufficient, and a rule nisi can only be granted in the first instance.

MR. Serjeant *Pell*, on a former day in this Term, had moved for a rule to discharge the defendant out of custody, under the statute 48 Geo. 3, c. 123, s. 1 (a), he being in execution, in *Warwick* gap*l.*, by virtue of a writ of *capias ad satisfaciendum*, sued out against him at the suit of the plaintiff. It appeared that notice had been given to the plaintiff to shew cause in the first instance, and the defendant made an affidavit that he had been imprisoned two years, and that judgment was obtained in this Court in *Easter Term*, 1820, and that the damages recovered by such judgment did not amount to 20*l.*

(a) By which it is enacted, that "all persons in execution upon any judgment, in whatsoever Court the same may have been obtained, for any debt or damages not exceeding the sum of 20*l.* exclusive of the costs recovered by such judgment, and who shall have lain in prison for the space of twelve successive calendar months next before the time of their application, shall, upon application for that purpose, in Term time, made to some one of his Majesty's superior Courts of record at *Westminster*, to the satisfaction of such Court, be forthwith discharged out of custody as to such execution, by the rule or order of such Court."

The Court directed the Secondary to search whether the judgment had been obtained in this Court as stated by the defendant, and the amount of the sum recovered by it, observing that the affidavit of the defendant, unsupported by other facts, was insufficient for this purpose; and on the officer's certifying that it had, and that the damages were less than 20*l.* and no cause being shewn, the rule was made

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Absolute (a).

(a) In *Ex parte Neilson*, 7 Taunt. 37, and *Magnay v. Gilhes*, Id. 467, it was decided, that, on a motion to discharge an insolvent debtor under that statute, the rule was not absolute in the first instance. But the practice is otherwise in the King's Bench.

FREEMAN v. WESTON.

Friday,
May 2nd.

MR. Serjeant *Pell*, on a former day in this Term, obtained a rule, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Keeper of the New Prison, *Clerkenwell*, as to this suit, on the ground that the plaintiff had not proceeded to charge him in execution in due time. He founded his motion on an affidavit, which stated that the defendant surrendered himself in discharge of his bail in this action on the 12th of *November* last, and was thereupon committed by one of the Judges of this Court to the custody of the Warden of the Fleet; and that the plaintiff's attorney was duly served with the notice of render on the following day: that the defendant had ever since remained charged with this action under the various custodies in which he had been, but that the plaintiff had not proceeded to charge him in execution in this suit, as by the practice of the Court he ought to have done.

This Court has no jurisdiction to bring up a defendant in custody on a criminal charge, in order to discharge him as to a civil suit, on the ground of the plaintiff's not having proceeded to charge him in execution in due time; as the Court cannot change the custody, and re-commit a defendant upon the criminal matter.—It is otherwise in the King's Bench, as a *habeas corpus* may be sued out on the Crown side of that Court.

Mr. Serjeant *Onslow* afterwards shewed cause on an
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affidavit which stated, that, on the 4th *December* last, the defendant was removed by *habeas corpus* from the custody of the Marshal of the King's Bench Prison to that of the Keeper of the New Prison, *Clerkenwell*; and that he was on that day tried and convicted of a misdemeanor before the magistrates, at the *Middlesex* Sessions, and sentenced by them to be fined 100*l.* and imprisoned one month in the New Prison; and that the defendant had ever since been, and still continued in such custody. It also appeared that the defendant had been brought up from that prison to this Court, by a writ of *habeas corpus*, in the last Term, and charged in execution in an action brought against him by a person named *Brooks* (a). The learned Serjeant submitted that this Court had no jurisdiction to order the defendant to be brought up from a criminal custody to be charged in execution, and then to remand him to such custody; and he relied on the case of *Bennett v. Kinnear* (b), where a defendant being in the criminal custody of the Court of King's Bench for a conspiracy, this Court refused to take him out of such custody for the purpose of surrendering him in discharge of his bail. So, in *Hodgson v. Temple* (c), where a person was arrested and held to bail

(a) The following is a copy of the rule in that cause:—

C. P.

Hilary Term, 3 & 4 *Geo.* 4.

John Brooks v. John Webbe Weston.

Wednesday, 12th February.

Upon reading the record of the judgment in this cause, the writ of *habeas corpus*, and the return of the Keeper of the New Prison, *Clerkenwell*, thereunto annexed, and it appearing that the said *John Webbe Weston*, amongst other things, stands criminally charged in the custody of the said Keeper of the said New Prison; and on hearing counsel on the part of the plaintiff, it is ordered that the defendant *John Webbe Weston* be remanded to the custody of the said Keeper of the said New Prison, charged in execution in this cause for the sum of 1000*l.* debt, and 4*l.* damages, as in the said record mentioned, there to remain until legally discharged.

By the Court.

(b) *Ante*, Vol. III. 259.—(c) 1 *Marsh*, 166; S. C. 5 *Taunt.* 503.

in a civil action, after which an extent issued against him at the suit of the Crown, and he was thereupon committed to the custody of the Sheriffs of *London*, the Crown having refused its consent to his being surrendered, unless he should be immediately remanded to the custody of the Marshal, this Court determined that they had no authority to remand him after he had been surrendered to the Warden of the Fleet; and Lord Chief Justice *Gibbs*, in delivering the opinion of the Court, observed, that this Court had no authority to direct the defendant to be brought up to be surrendered in discharge of his bail; inasmuch as they could not remand him to the custody of the Marshal after he had been surrendered to the Warden. It is true, that the Court of King's Bench has authority in such a case to grant a *habeas corpus* to surrender a defendant in discharge of his bail, by virtue of its criminal jurisdiction; and the *habeas corpus* under which a defendant is brought up, is issued on the Crown side of that Court: but it is clear that in this Court a plaintiff has no power to remove a defendant from any custody where he is confined on a criminal charge, to that of the Warden of the Fleet, either for the purpose of surrendering him in discharge of his bail, or charging him in execution. If this be so, no laches can be imputed to the plaintiff; and although the Court had ordered the defendant to be charged in execution in another action in the course of the last Term, it was done inadvertently, and the facts were not then brought before them.

[Lord Chief Justice *Dallas*.—The attention of the Court was certainly not called to the circumstances attending that particular case at the time. The defendant applied for his discharge in the first instance before me at Chambers, which I refused, and directed him to come to the Court; and the particular facts were not stated when the motion was made, nor were they adverted to on the last day of

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the Term, when the rule was made absolute; and the officer has since stated that he was also ignorant of the circumstances at the time.]

Mr. Serjeant *Pell*, in support of the rule, observed, that a similar application had been made by the defendant to Mr. Justice *Bayley*, on the 23d *February* last, on the ground, that a plaintiff, in an action commenced against him in the Court of King's Bench, had not charged him in execution in due time, and that learned Judge made an order to discharge him out of the custody of the Keeper of *Clerkenwell* as to that action; and here it is quite clear, that, according to the rules of this Court, he should have been charged in execution within two Terms. This case is distinguishable from that of *Hodgson v. Temple*, as there the application was to bring up the defendant in order that he might be surrendered in discharge of his bail, and for that purpose he must have been brought from the criminal custody in which he was then placed, and taken to the Fleet; and there would be a difficulty in changing the custody or discharging him, and then re-committing him for the criminal matter; but, here, he was not to be taken out of the custody in which he was criminally charged, but merely to be brought into Court, for the purpose of having his discharge entered against the plaintiff's detainer *as to this suit*, as he had not been charged in execution in due time. Although in *Walek v. Davies* (a), this Court would not grant a *kabeas* to bring up a prisoner in custody upon a criminal matter, in order to have him charged with a declaration in a civil action, yet that would have the effect of continuing him in custody, whilst here, it was sought to discharge him from this particular suit. Even if this Court has no jurisdiction to bring up the defendant for the purpose of his being discharged, either by *kabeas corpus* or otherwise, still it

(a) 2 New Rep. 245.

was incumbent on the plaintiff, under the circumstances, to have made an application to enlarge the time to charge him in execution, and not having done so, he must be considered as having been guilty of laches. If a sheriff does not return a writ according to its exigency, and within a given time, it may, where occasion requires, be enlarged from Term to Term; and here, as it was the duty of the plaintiff to have charged the defendant in execution within two Terms, if he had been prevented from so doing by the custody in which he was then placed, he should have made an application to the Court, which would have been granted as a matter of course.

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Cur. adv. vult.

Lord Chief Justice DALLAS now delivered the judgment of the Court as follows:—This is an application to discharge the defendant out of the custody of the Keeper of the New Prison, at *Clerkenwell*, as to this suit, on the ground that the plaintiff had not proceeded to charge him in execution in due time. If the plaintiff has not been guilty of laches in charging him in execution, the ground of the present application must fail; and although the defendant was not charged within two Terms, still he is not entitled to be discharged. The only question then is, whether the plaintiff has been guilty of laches or not. The defendant was originally surrendered in discharge of his bail, to the custody of the Warden of the Fleet, from whence he was removed, in the first instance, to the King's Bench Prison, and was afterwards committed to that of *Clerkenwell*, under a criminal charge, and sentenced to be imprisoned there for a term which has not yet expired. Now, in order to charge him in execution in this Court, he should have been under the custody of the Warden of the Fleet; but he was brought up here to be charged in the last Term, whilst he was in the custody of the Keeper of the New Prison. It is clear that the plaintiff could not have done this without the assistance

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of the Court, which is not even empowered to have him brought before it for that purpose. In *Walsh v. Davies*, where all the authorities on this subject were discussed and fully considered, it was held, that a party in custody on criminal process could not be charged with a civil action in this Court, as we cannot change the custody, and afterwards commit the party again upon the criminal charge. There, it is true, the Court refused to bring him before them in order to have him charged with a declaration; but a defendant is equally entitled to the privilege of being discharged, whether he be brought up for the purpose of being charged with a declaration, or in execution; and if he is not entitled to be discharged in the one case, he cannot be in the other. Although this may have been done in the Court of King's Bench, it must be observed, that that Court has a criminal jurisdiction, and what may be done there in cases of this description, cannot apply to any proceedings which may have been adopted here. There, too, it appears that the *habeas corpus* to bring up a prisoner can only be taken out on the Crown side of the Court. Here, however, it has been pressed on the Court, that the plaintiff should have applied to us for an extension of time to charge the defendant in execution. This is only necessary where the plaintiff has been guilty of laches; but in the present case, as the plaintiff could not take any step for that purpose during the period the defendant was in the custody of the Keeper of the New Prison, an application of that description would have been useless, and more particularly so, as the Court had no power to assist him. It has been further said, that, as the defendant has in one instance been brought here, and charged in execution since the commencement of the criminal custody, *a fortiori* he is entitled to make the present application for his discharge. But, at the time he was so charged, the officer was not aware of the circumstances under which he came before the Court, and they were not

then disclosed to them. But even if he had been charged in execution by order of the Court, yet as their attention was not drawn to the circumstances of the case at the time, it would have formed no precedent, and they might afterwards, on a proper application being made, have discharged or withdrawn the order, as having been improvidently made. Here, the certificate of the causes of detainer against the defendant, returned by the Keeper of the *Clerkenwell* Prison, and the rule made by the Court of King's Bench on his committal there, are of themselves sufficient to shew the propriety of the decision to which this Court must conform, in holding that they are not empowered to have the defendant brought before them to be charged in execution; for the rule states, that after the term of the defendant's imprisonment in the New Prison should have expired, and a certain fine paid by him, he was to be re-delivered to the custody of the Marshal of the King's Bench, charged with this action and the several other matters mentioned in the return. Under these circumstances, therefore, we are of opinion that this rule must be

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Discharged (a). :

(a) See *Neill v. Lovell*, ante, Vol. III. 8; *Grimes v. Joseph*, IV. 380.

BROOKS v. WESTON.

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MR. Serjeant *Pell* then obtained a rule *nisi*, that the rule which had been made in the last Term (a), for charging the defendant in execution in this cause, might be discharged with costs, on the grounds that it had been improperly obtained; and that the defendant had been irregularly brought up for the purpose of being so charged; and he

If a rule of this Court has been drawn up improvidently or by mistake of the officer, it may be discharged on terms.

(a) See ante, p. 82.

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observed that he still continued in custody at *Clerkenwell* Prison, as he was unable to pay the fine imposed on him by the Magistrates at Sessions: and on Mr. Serjeant *Peake's* shewing cause, the Court observed, that as the rule had been improvidently drawn up and issued, through the mistake of the officer, the rule for discharging it must be made

Absolute, but without costs.

Saturday,
 May 3d.

BARFORD, Administrator of NATHANIEL PITTS, deceased, v.
 STUCKEY.

Where *A.* and *B.*, by deed, after reciting that *C.* had devised certain lands to them in strict settlement, with remainder over to *D.* on failure of issue male of *A.* and *B.*; and that as *C.* had not made any other provision for *D.*;—in consideration of the esteem and regard *A.* and *B.* bore towards him, they agreed with *D.*, his executors, or administrators, to pay him an annuity for twenty-one years, if *A.* and *B.*, or the survivor of them, should so long live; or in case *D.* should die within the term, then to his child or children, if any; but if there should be no child, to his then wife so long as she should continue a widow: and *D.* agreed that in case he or his heirs should come into possession of the property left by *C.*, by virtue of the limitations in the will or otherwise, he would repay to *A.* and *B.* all sums received by him, his children, or wife, on account of the annuity; and *D.* died within the term, intestate, leaving one daughter, who also died intestate within the term, and his wife died in his life-time:—Held, that *D.*'s administrator could not maintain an action against *B.* for non-payment of the annuity, after such respective deaths;—on the ground that it was not the intention of the grantors that the annuity was to continue beyond the lives of the grantee and his family as described in the deed, and that the grant to them was merely personal, and could not be carried further.

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the sons of the said *B. J. Bartlett*, lawfully begotten, and their heirs; and in default of issue male of the said *B. J. Bartlett*, remainder to the use of the defendant and his assigns for life; remainder to the use of the first son of his body lawfully begotten; and in default of such issue, remainder to the use of the second, third, fourth, fifth, and all other the sons of the defendant lawfully begotten, and their heirs; and in default of issue male of the defendant, remainder to the use of the said *Nathaniel Pitts* and his assigns for life, with divers remainders over; and that the said *John Stuckey* did in and by his said will also give and devise unto the said *A. Follett* and *T. Stocker* certain other messuages, farms, lands and hereditaments, in his said will also expressed; to hold the same unto the said *A. Follett* and *T. Stocker* and their heirs, to the use of the defendant and his assigns for his life; remainder to the use of the first son of his body lawfully begotten; and in default of such issue, remainder to the use of the second, third, fourth, fifth, and all other the sons of the defendant lawfully begotten and their heirs; and in default of issue male of the defendant, remainder to the use of the said *B. J. Bartlett* and his assigns for life; remainder to the use of the first son of his body lawfully begotten; and in default of such issue, remainder to the use of the second, third, fourth, fifth, and all other the sons of the said *B. J. Bartlett*, lawfully begotten, and their heirs; and in default of issue male of the said *B. J. Bartlett*, remainder to the use of the said *N. Pitts* and his assigns for life, with divers remainders over;—and further reciting, that in regard that the said *John Stuckey* did not in and by his said will make any further or other provision for the said *Nathaniel Pitts*, and that in consideration of the great regard and esteem which the said *B. J. Bartlett*, and the defendant, had for, and bore towards the said *Nathaniel Pitts*, they, the said *B. J. Bartlett* and the defendant, had agreed to grant him an annuity of 500*l.* *per ann.* for the

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term of twenty-one years, in case they should so long live, and in the event of either of their deaths within the said term, then, if the survivor should so long live, and be in the actual possession of all the said settled hereditaments, to commence from the 25th March then last, and to be paid half yearly; and in case of the death of the said *Nathaniel Pitts*, before the expiration of the said term of twenty-one years, they the said *B. J. Bartlett* and the defendant had further agreed, that they or the survivor of them would pay the said annuity for the term aforesaid, subject as aforesaid, to and for the use and benefit of the child or children of the said *Nathaniel Pitts* (if any) in such proportions as he the said *N. Pitts* should by deed or will appoint; and in default of such appointment, for the benefit of all his children equally; but in case there should be no child of the said *N. Pitts* living at the time of his decease happening within the said term, then the said annuity was to be paid in like manner for the then remainder of the said term of twenty-one years, in case the said *B. J. Bartlett* and the defendant, or the survivor of them should be then living, unto his then wife, for and during such period only of the said term as she should continue his widow: which said annuity of 500*l.* it was agreed should be paid in the proportions following; that is to say, 350*l.* as and for the said *B. J. Bartlett's* share thereof, and 150*l.* as and for the defendant's share thereof;—and it was also agreed, that if on the death of the said *B. J. Bartlett*, or the defendant, within the said term, the survivor of them should be in possession of the said manors, messuages, hereditaments, and premises, then the said annuity should be paid as before stipulated by such survivor for the then remainder of the said term of twenty-one years in case such survivor should so long live; but that in case the said *Nathaniel Pitts* or his heirs, should, at any time during the said term, come into possession of the said manors, messuages, farms,

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lands and hereditaments, under the limitations in the will of the said *John Stuckey* expressed, or should otherwise by operation of law, obtain or get into possession of the hereditaments and premises by the will of the said *John Stuckey* devised, that then, the annuity was to cease and be utterly void; and then, and in either case, the said *Nathaniel Pitts*, his heirs, executors, or administrators, were to repay to the said *B. J. Bartlett* and the defendant respectively, and to the survivor of them, their and his executors and administrators, in the proportions aforesaid, all sums of money by him the said *N. Pitts*, his children, or wife, received for, or on account of the said annuity:—It was therefore witnessed, that, for the considerations aforesaid, they the said *B. J. Bartlett* and the defendant, did, by the said agreement, for themselves severally and respectively promise and agree to and with the said *Nathaniel Pitts*, his executors, and administrators, that they the said *B. J. Bartlett* and the defendant should and would during the said term of twenty-one years, to commence as aforesaid, in case they should so long live, well and truly pay, or cause to be paid unto the said *Nathaniel Pitts*, or, in case of his death within the said term, then unto or for the use of his child or children, if any; but if not, then unto his then wife in case she should remain his widow, one annuity or clear yearly rent or sum of 500*l.* of lawful money, in the proportions and shares therein before mentioned, by two equal half-yearly payments on the several days and times thereafter mentioned, that is to say, the 29th September and the 25th March in each and every year, together with a proportionable part of the said annuity up to the time of the decease of the survivor of them the said *B. J. Bartlett* and the defendant, in case they should both die before the expiration of the said term of twenty-one years, and such survivor should happen to die between any of the said half-yearly days of payment, and before a full half-yearly payment should become due and payable, without any

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deduction, defalcation, or abatement whatsoever; the first payment thereof to be made and begin on the 29th September then next ensuing the date of the said agreement. —The plaintiff then averred, that, after the making of the agreement and during the term of twenty-one years therein specified, and whilst the annuity of 500*L*. was payable by virtue of the agreement, to wit, on the 1st August, 1815, *Nathaniel Pitts* died without making any appointment, by deed, will, or otherwise, respecting the said annuity or the payment thereof: that at the time of his death *Martha Elizabeth Pitts* was his only child, and that she survived him until the 1st November, 1818, when she died, within the term, intestate, and without making any appointment; and that on the 15th of November administration of her effects was granted to the plaintiff; that the wife of *Nathaniel Pitts* died in his life-time and within the term, to wit, on the 1st January, 1815; and that after the decease of the said *Nathaniel Pitts*, to wit, on the 23d November, 1820, administration of his effects was also granted to the plaintiff. The plaintiff then assigned for breach, that although neither the said *Nathaniel Pitts*, nor *Martha Elizabeth Pitts*, nor any person for the use or benefit of them, or either of them, nor any person claiming under them, had ever come into possession of the said manors, &c. under the limitations in the will of the said *John Stuckey* expressed, or otherwise, nor by operation of law had obtained or got into possession of the hereditaments or premises by the will of the said *John Stuckey* devised; yet, that the defendant had not, nor had any other person during the said term of twenty-one years, which is not yet expired, paid the defendant's proportion and share of the annuity in the agreement mentioned, to the plaintiff as administrator as aforesaid, since the death of the said *Nathaniel Pitts*; but that on the contrary thereof, heretofore, and since the death of the said *N. Pitts*, to wit, on the 25th March, 1820, there became and was payable

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and in arrear the sum of 725*l.*, for three half-yearly payments of the said share or proportion of the said annuity so agreed to be paid by the said defendant, and which was still in arrear and unpaid.—The defendant craved *oyer* of the deed, which contained the same covenants and conditions as those stated in the declaration, with the further addition of the following clause at the conclusion of the deed; *viz.* “And the said *Nathaniel Pitts*, for himself, his heirs, executors, and administrators, doth hereby promise and agree, to and with the said *B. J. Bartlett* and the defendant, and the survivor of them respectively, and with their respective executors and administrators, that in case he the said *N. Pitts* or his heirs should at any time during the said term come into possession of the said manors, &c. under or by virtue of the limitations in the will of the said *John Stuckey* expressed, or should otherwise by operation of law obtain possession of the hereditaments by the will of the said *John Stuckey* devised, then that he the said *Nathaniel Pitts*, his heirs, executors, or administrators, should and would immediately thereupon well and truly pay, or cause to be paid, unto the executors or administrators of the said *B. J. Bartlett* and the defendant, or the survivor of them respectively, in the proportions aforesaid, all and every sum and sums of money received by him, his said children, or wife, for or on account of the said annuity. In witness,” &c. —The defendant then demurred generally to the whole declaration, and the plaintiff joined in demurrer.

This case was twice argued: First, in the last *Trinity* Term, by Mr. Serjeant *Taddy* for the defendant, and Mr. Serjeant *Lens* for the plaintiff; and again on this day, by Mr. Serjeant *Peake* for the defendant, and Mr. Serjeant *Bosanquet* for the plaintiff.

The arguments for the defendant and in support of the demurrer, were as follows:—By the events which have happened, the annuity has ceased, and there is no person

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beneficially interested, who is now entitled to claim it as against the defendant as one of the grantors. The intention of the parties can be only looked at as it appears on the face of the deed, and the provisions therein contained, from which it is manifest that the grantors intended to confine the annuity to the persons named in the deed, and to give *Nathaniel Pitts* (the grantee) an estate for life only, with a power for him to dispose of it to his surviving children; but that if there should be none living at the time of his decease, then to his wife during her widowhood. It was not meant to make any ulterior provision, or create a vested interest in the children of *Nathaniel Pitts*, so as to make it transmissible to their representatives: neither was it to be an absolute grant of an annuity for twenty-one years, but to be determinable on the respective deaths of the grantee, his wife, and children; all which events took place within the term for which the annuity was granted. There is a manifest distinction between a covenant and an agreement; and the grantors agreed, in case of the death of the grantee within the term, to pay the annuity to the use of his children, if any; but that if he should have no child living at the time of his decease, then to his wife so long as she should continue his widow. The daughter who survived him had no beneficial interest so as to pass to her representatives. Although the grantors agreed with *N. Pitts*, his executors, or administrators, as to the discharge of any arrears that might be due at the time of his death, still they did not agree to pay him and his executors, but such children, if any, as he should appoint, and in default thereof to his wife. If it were intended that the personal representatives of the issue or wife should take, the words "executors or administrators" would have been added; but the interest was to be confined to them individually and personally, and to them alone. So if it were meant that the representatives of either should take an interest, it would have been expressed, as

in the clause at the end of the deed, where the grantee, for himself, his heirs, executors, and administrators, agreed with the grantors and their respective executors and administrators to repay all sums received by him on account of the annuity, in case he should come into possession of the property under the limitations contained in the will. If the word "executors" had been introduced after that of "children," and children had been born and died in the life-time of their father, he would be entitled to dispose of the term absolutely, by taking out administration to such deceased children, so as to exclude his wife. So, if a child, after the death of the father, can be deemed to have taken an absolute interest during the term, and had died before the mother, the annuity, instead of going over to her, might have gone to the representative of the child; and if a gift to such representative can be implied, it would, at all events, divest the right of the mother altogether, although it was the clear intention, that, if there were no children living at the time of the death of *Nathaniel Pitts*, she should take during her widowhood. The devise to *N. Pitts* was so remote that it was next to an impossibility that he could take under the will; the grantors, therefore, were anxious to make a provision for him and his family only, as no beneficial provision for them had been made by the testator. If it had been the intent that the annuity should continue, notwithstanding the decease of the parties beneficially interested, it would have been provided for accordingly; but as the deed does not embrace their representatives, they may be considered as perfect strangers to it, and more particularly so, as the consideration moved only from the grantors to the grantee, his wife, and children. Although it is a general principle, that in cases of doubt, a deed must be interpreted most strongly against the grantor; yet, where the meaning is ambiguous, the whole of the instrument must be taken together, so as to collect the intent of the parties at the time such deed was entered

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into. That was decided in the case of *Roe d. Wilkinson v. Tranmer* (a), and the same rule was recognised and laid down in *Payler v. Homersham*; and Lord *Ellenborough* there said (b), that "in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it;" and Mr. Justice *Bayley* added, that "there is no doubt but that a particular recital in a deed would restrain the general words;" and that principle was fully adopted by this Court in delivering their judgment in *Nind v. Marshall* (c). Here, therefore, on looking at the whole of the provisions contained in the deed, it does not operate as an absolute grant of an annuity for a specific term, but a mere agreement by the grantors to pay it to certain persons therein described. It was not founded on any pecuniary consideration, but on account of the disappointment the grantee had experienced in consequence of the provisions of the testator's will. He had no power to sell his interest, but a mere power of appointment to his children; and if he made none, it was not to revert to him or any other person he might appoint, but to his issue only, and on their deaths to his widow, and if he had died without issue she would have taken it immediately. If, therefore, *N. Pitts*, the grantee, could not dispose of it so as to dispossess his children or widow, the law will not give them a greater interest than he himself had; and if they all died within the term, the meaning of the parties was, that the payment of the annuity should altogether cease, as it was not granted to the grantee and his assigns, or to the executors or administrators of his wife and children; but that if either of them survived during the term, then the annuity was to be paid to such survivor alone: and the covenant by the grantee as to the re-payment of what might be received by him on account of the annuity, in case he should come into possession of the property, is confined

(a) 2 Will. 75.—(b) 4 Mas. & Selw. 466.—(c) *Ante*, Vol. III. 715, 720, 735,

to such sums as might be received by himself; his children, or wife; thereby clearly shewing, that they only were intended to take any benefit under the deed, at the conclusion of which, the grantee not only bound himself, but his heirs, executors, or administrators, to make such repayment.

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Arguments for the plaintiff.—The object of the parties, at the time the deed was executed, was to give *Nathaniel Pitts* as large and beneficial an interest as possible, and that interest has not ceased by any of the events which have since taken place. The grant is not only to be taken most strongly against the grantors, but if there be any ambiguity on the face of the deed, it must be construed beneficially, and in favour of the grantee, and the intention must be looked at, and the Court must give effect to it, as in the case of a will. The question arises on the covenant for the payment of the annuity, by which the grantors promised and agreed with the grantee, his executors, or administrators, to pay him an annuity during the term of twenty-one years, or, in case of his death within that term, then to his children, or widow. It is therefore not a covenant to pay during the term of twenty-one years, if the parties should so long live, but to pay absolutely to them, in a certain order of succession. It is consequently unnecessary to consider who may now be beneficially interested, as the simple question is, whether the interest has altogether ceased. If it has not, the grantee would have an absolute interest, and the plaintiff as his personal representative is entitled to sue. If the covenant for the payment of the annuity had been confined to the grantee alone, it is quite clear that, in case of his death, his executors or administrators would be entitled to receive what might become due during the remainder of the term, although they were not mentioned in the indenture. In *Gifford v. Goldsey* (a), where *A.* devised to *B.*

(a) 2 Vern. 35.

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a rent out of a lease for years, determinable on lives, to be paid half-yearly, if the *cestui que vies* so long lived, and *B.* died during their life-time; it was decreed that the rent was not determined, but should be paid to the executors of *B.* during the term; and *Rolle's Abridgment* (a), was there quoted as an authority, where it is said, that "if a man, possessed of a lease of land for a term of years, grants a rent of the land to another generally, without limiting any estate, the rent shall continue during the whole term, and is not determinable by the death of the grantee." So, here, the interest has not ceased, and if any part be undisposed of, it remains in the grantee or his representative. It is unnecessary to consider whether the representative of the daughter might be entitled, as she might only have an equitable right, and on her death it would revert to the grantee. So, if the widow had married, her interest would cease, but the representative of the grantee would still be entitled to the payment of the annuity. Throughout the whole of the deed, there is an apparent anxiety by the grantors to continue the annuity, and that it should not be put an end to for the term of twenty-one years, provided they should so long live and be in possession of the estate devised to them: and the only event on which the interest of the grantee was to cease, is contained in the proviso as to his coming into possession of the premises so devised; and as that event has not happened, the annuity must be still held to be subsisting for the residue of the term during which it was stipulated to be paid. Throughout the whole of the deed a reference is made to the *term aforesaid*; that must be taken to refer to the existence of the grantee's interest during the definite term of twenty-one years, and the annuity was consequently payable to any person who was entitled to the beneficial interest, subject only to the death of the grantors. That interest is now vested in the plaintiff as the administrator of *Nathaniel Pitts*, the grantee, and

(a) Vol. I. tit. *Estate*, H. pl. 5, fol. 831.

it is immaterial that he is the personal representative of both him and his daughter who survived him.

In reply, it was submitted that the words "during the term *aforesaid*" could only apply as to the existence and continuance of the interest, as in a lease, or the intent of the parties who created it. If, therefore, the interest is put an end to by any events which have happened since the deed in question was executed, so is the term created thereby; and it was the clear and manifest intent of the grantors, that the interest should not continue beyond the lives of the grantee, his wife, and children, and they did not contemplate that the annuity should be payable to either of their representatives in case they all died within the term for which it was stipulated to be payable, and as that event has happened, the annuity thereby ceased; and it cannot be contended for a moment that if a creditor had taken out letters of administration to the grantee, that he would be entitled to receive the annuity which was intended to be confined to the individual branches of the family of the latter, as specified in the deed.

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Lord Chief Justice DALLAS.—It has been admitted in the course of the argument, that this is a question of intention only, and which, either in a deed or will, as well as in all other cases of a like description, must be collected from all the words of the instrument taken together, the effect and purview of which is to be considered with reference to its object, and must be so construed by the Court. What, then, is the question of intention in this case? It has been admitted that no decision applies to it either directly or indirectly. Looking at the whole of the deed, it appears to me that it was a provision founded on personal kindness, and intended by the grantors to apply to the family of *Nathaniel Pitts* only; and I therefore think that the annuity in question has ceased by the events which have happened. The defendant and *Bartlett*

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agreed, in the first place, to pay him an annuity of 500*l.* a-year for twenty-one years, in case they should so long live; or, in case of his death within that term, then to the use of his child or children, if any, in such proportions as he should appoint, and in default of appointment, to all of them equally; and if there should be no child, then to his wife, during the term of her widowhood. The events were, that *Nathaniel Pitts* died within the term, leaving one child, who also died during that period, and that his wife also died in his life-time, without leaving any surviving issue. I therefore think that all the events have happened to which the grantors looked at the time they entered into the agreement, as they intended to provide for the branches of the family of *Nathaniel Pitts* only, and did not intend to confer or give any interest beyond the life of the last liver. Without, therefore, looking at any particular covenant in the deed, but taking the whole of its provisions together, the intent appears to me to be clear, that the annuity should not continue beyond the lives of those for whom it was meant to provide: and adopting the argument of my Brother *Peake*, I think, that on the construction of the whole of the deed, the annuity ceased on the death of *Murtha Elizabeth Pitts*, and consequently that the defendant is entitled to judgment.

Mr. Justice PARK.—The rules of construction as to an instrument of this description have been most properly stated by my Brother *Bosanquet*; viz. that it is to be taken most strongly against the grantor, and that the intention is to be collected from the whole of it. This appears to be in the nature of a beneficial grant, and not as an agreement made by grantors who came into possession of the grantee's property under a devise. The defendant and *Bartlett*, most generously, considering that the testator ought to have made some provision for *Nathaniel Pitts*, agreed to settle an annuity of 500*l. per annum* on him for the term

of 21 years. It does not appear upon the deed that *Pitts* had any children at the time of the grant: it must be inferred that he had not, as in case of his death within the term, the annuity was to be paid to the use of his child or children, *if any*. It was therefore payable to him alone in the first instance, and could only apply to any issue he might thereafter have; and his wife was only to be provided for, or enjoy the annuity, after the death of such children; as it must be presumed that during their lives, care would be taken to provide for their mother. From the whole of the deed, it appears to me to be perfectly clear; that the intent of the grantors was to do a liberal act of kindness to *Nathaniel Pitts* and his family only; and that intent is manifest by the clause of repayment in the deed, by which it was provided, that in case *Pitts* or his heirs should at any time during the term, come into possession of the property devised by the will, either he, his heirs, executors, or administrators, should immediately pay to the grantors every sum received by him, his children, or wife, on account of the annuity. This shews who were to receive the benefit of the annuity: and from the first time the case was brought before the Court to the present moment, I have entertained but little doubt that the annuity ceased on the death of the daughter of *Nathaniel Pitts*.

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Mr. Justice BURROUGH.—I at first doubted, as the annuity was granted to the child or children of *Pitts*, whether it did not extend their interest beyond their lives. On consideration, however, I am now of opinion that such doubt was unfounded. It is usual in a deed of this description to introduce specific clauses of *cesser*; but on looking at the objects for which it was intended to provide, it appears to be unnecessary, as it is clear upon what events the annuity was to cease. On the death of *Pitts*, his child or children were to take; and in case of their decease, it was then to go to his wife so long as she re-

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mained his widow. If it had been intended that the interest should extend beyond the lives of the children, a clause to that effect would have been introduced in that part of the instrument, or the words executor or administrator might have been inserted. No such additional words, however, are to be found, nor is any other person looked at than the family of *Pitts*. The grant to the children was merely personal, and the annuity was to be confined to his family alone, viz. his children and wife. The provision in the deed, which has been alluded to by my Brother *Peake*, is strong evidence of such an intent, viz. that in case *Pitts* or his children should come into possession of the property, they should repay to the grantors the sums received by them by virtue of the annuity. Such re-payment, therefore, is altogether personal. It is quite clear, that if the plaintiff had been a creditor of *Nathaniel Pitts*, he could not have been entitled to enjoy the annuity; and if there were no next of kin of the intestate, he might, as a creditor, have taken out letters of administration, and thereby become his personal representative. I therefore fully concur with the Court in thinking, that by the events which have occurred, the annuity has ceased, and consequently that there must be

Judgment for the defendant.

Monday,
May 5th.

HAYMAN v. BACH.

Where the defendant being indebted to the plaintiff in 24*l.* 6*s.* 10*d.*, the latter caused a writ of *capias ad respondendum* to be issued against him for 20*l.* and upwards, on which proceedings on payment of debt and costs, gave an undertaking to pay them on or before a given day, on which the order was granted, and the costs were afterwards taxed, but the defendant refused to pay:—Held, that the plaintiff could not compel the defendant to make such payment, although the undertaking to do so was made before the order, as the latter was conditional in terms; and that if it were not complied with, the plaintiff might proceed in the action as if no such order had been made.

he was arrested on the 2d *January* last, when he deposited 20*l.* with the sheriff, and 10*l.* for costs. The defendant not having put in bail, those sums were paid into Court by the sheriff, and afterwards taken out by the plaintiff; but being insufficient to satisfy the whole amount of the debt and costs, the defendant on the 7th *February* last obtained a summons to stay the proceedings, on payment of 24*l.* 6*s.* 10*d.*, the amount of the debt due from him to the plaintiff, together with costs to be taxed by the Prothonotary, and afterwards entered into an undertaking to pay that sum and costs on or before the *Monday* following, on which an order was accordingly granted. The costs, up to the date of the order, were afterwards taxed by the Prothonotary at 20*l.* 17*s.*, leaving at that time a balance due to the plaintiff on his original demand of 4*l.* 6*s.* 10*d.*, and the further sum of 10*l.* 17*s.* as the balance of the costs so taxed; and it was sworn that several applications had been made to the defendant to pay such sums, but that he had neglected so to do.

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Mr. Serjeant *Peake* now moved on behalf of the plaintiff, for a rule to shew cause, why the defendant should not, within four days after the service of such rule, pay to the plaintiff or his attorney the above sums of 4*l.* 6*s.* 10*d.* and 10*l.* 17*s.* with all costs incurred since the taxation by the Prothonotary, together with the costs of this application. He submitted that the defendant was liable to do so on his undertaking, which was given before the order was granted: and he admitted that even if that order had been made a rule of Court, the defendant might contend that it was merely conditional, but that his liability attached on his original undertaking.

But the Court refused the motion; saying, that the order to stay proceedings was only conditional on payment of debt and costs: that the condition not having been

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complied with, the plaintiff might proceed in the cause, or bring an action on the undertaking: that if this rule were granted, it would apply to all cases where money was not paid according to a Judge's order; and that whenever such orders were made, it was the practice for the defendant to enter into an undertaking at chambers, to pay the debt and costs within a given time; and if they were not afterwards paid according to that undertaking, the plaintiff might proceed in the action as if no such order had been made.

The learned Serjeant, therefore, took nothing by his motion (a).

(a) See *Fricker v. Eastman*, 11 East, 319.

Tuesday,
May 6th.

BUTLER v. BULKELEY and others.

Judgment is not final by the Prothonotary's marking the *postea* on the record, but on his completing the taxation of costs by inserting their amount in the *allocatur*.

THIS was an action on a bill of exchange for 1800*l.* and commenced in *Hilary* Term, 1817, and the damages were laid at 2000*l.*, but it was not tried until the Sittings after *Hilary* Term, 1821, when a verdict was found for the plaintiff, damages 2,271*l.* 19*s.* 6*d.* The defendants afterwards tendered a bill of exceptions, and eventually brought a writ of error. There being considerable difficulty as to the form of the bill of exceptions, it was not settled until the commencement of the last *Hilary* Term; and as the plaintiff considered himself entitled to the costs of settling it, he did not tax his costs until the 27th *January* last, when the *postea* on the record was marked by the Prothonotary, and he proceeded to tax the costs. In the course of taxation, he discovered that the damages had been given for too small a sum, as they did not cover the interest on the bill. The plaintiff, therefore, applied for a Judge's order to amend the declaration, by increasing the damages, be-

fore he called on the Prothonotary to sign his *allocatur*, and which had not then been done. The Judge, however, refused to make any order, but directed an application to be made to the Court. Accordingly—

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Mr. Serjeant *Lens*, on the last day of the last Term, obtained a rule *nisi*, that the plaintiff might be at liberty to amend his declaration, as well as the issue and record of *Nisi Prius* in this cause, by increasing the damages from 2000*l.* to 2,300*l.*

Mr. Serjeant *Pell* now shewed cause; and observed, that the only question was, whether, when the record was marked by the Prothonotary, it could be considered as final judgment had been signed, although he had not completed the taxation, or ascertained the amount of the costs. He admitted, that if it could be considered that final judgment had not been signed by his marking the *postea*, it was in the discretion of the Court to amend the record; and observed, that the case of *Blackburn v. Kymer* (a), appeared to be against him, where it was held, that if a writ of error is sued out before final judgment, the four days for putting in bail in error, are to be reckoned from the time when the taxation of costs is completed by the insertion of the amount when ascertained. There, it was contended that final judgment must be considered as signed, at the time when the Prothonotary commenced his taxation of costs; and on the other side it was insisted that judgment could not be said to be finally signed, till the amount of the costs had been inserted; and Lord Chief Justice *Gibbs*, in delivering the judgment of the Court, said (b), that “the argument which was used in support of the latter proposition carried great weight with it; for if bail must be put in before the amount of the costs was

(a) 1 Marsh, 278.—(b) *Id.* 280.

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ascertained, the bail would not know the sum for which they were becoming responsible, and consequently that the four days must be reckoned from the time of completing the taxation of costs." That, however, merely went as to the time for putting in bail in error; but here, the marking the record by the Prothonotary must be considered as signing final judgment, from the strong circumstance, that a plaintiff may, and in point of fact frequently does, where he has reason to expect that a writ of error will be brought for delay, waive his increased costs, and issue an execution at once for his damages, and 40s., without waiting to have his costs taxed (a).

Mr. Prothonotary *Watlington* observed, that the practice is, to have the *allocatur* of damages and costs prepared at the commencement of the taxation, leaving a blank for the amount of the costs, which is not filled up until the amount is ascertained; and that the *allocatur* was not complete until that sum was inserted.

The Court were therefore of opinion, that final judgment could not be considered as signed until the completion of the *allocatur*; and as the insertion of the amount of the costs was incident to such completion, they ordered the rule to be made absolute for the amendment, on payment of costs, by adding the sum of 300*l.* to the damages as laid in the declaration.

Rule absolute accordingly.

(a) See *Somerville v. White*, 5 East, 146; *Doe d. Messiter v. Dynley*, 4 Taunt. 289.

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SKEEN v. M^CGREGOR.Tuesday,
May 6th.

MR. Serjeant *Lawes* applied for a rule *nisi*, that the bail bond which had been given to the sheriff of *Middlesex*, in this cause, might be delivered up to be cancelled, on the ground of an insufficiency in the affidavit to hold to bail, which was in the following terms:—

“*Richard Lawrence*, of, &c., maketh oath, that the defendant is justly and truly indebted to the plaintiff in the sum of 499*l.* 10*s.* upon and by virtue of a certain charter-party of affreightment, bearing date the 18th *January*, last past, for and on account of the hire of a certain ship or vessel called the *Skeen*, let to hire by the plaintiff to the defendant, and by him taken for a certain voyage from the port of *Leith* to *Poyais*.”

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in a certain sum, upon and by virtue of a certain charter-party of affreightment, bearing date, &c. for and on account of the hire of a certain ship called the *S.*, let to hire by the plaintiff to the defendant, and by him taken for a certain voyage from the port of *L.* to *P.*, is sufficiently certain, without formally shewing a breach of any particular stipulation or condition contained in the charter-party.

He submitted that the affidavit should have stated what stipulations or conditions the charter-party contained, and that a particular breach should have been shewn on the face of the affidavit; whereas, it was only sworn that a certain sum was due on a charter-party, for and on account of a ship let to hire by the plaintiff to the defendant, and taken by the latter for a certain voyage, without stating whether the plaintiff's claim arose for freight or demurrage, or otherwise shewing the nature of the debt due to him on the charter-party, which, consistently with the affidavit, might be for general damages or a penalty. He cited the case of *Hatfield v. Linguard (a)*, where an affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in 1000*l.*, under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c. which said balance was still due and unpaid, without stating that the balance was 1000*l.*, was held to be defective. So, in *Stinton v. Hughes (b)*, it was decided that

(a) 6 Term Rep. 217. — (b) *Id.* 13.

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an affidavit to hold to bail for stipulated damages, for non-performance of an agreement, must state a breach of the agreement; and in *Macpherson v. Lovie* (a), an affidavit of debt, stating that "the defendant was indebted to the plaintiff in the sum of 1000*l.*, upon and by virtue of a certain memorandum in writing, bearing date, &c., and signed by the defendant, whereby he promised the plaintiff that when he returned in the month of *March* or *April*, then next, he would marry her or pay her 1000*l.*," without shewing any mutual consideration on the part of the plaintiff to sustain the defendant's promise, was insufficient, as the Court could take nothing by intendment in an affidavit of debt.

Lord Chief Justice DALLAS referred to the general rules laid down by this Court as to the requisites and sufficiency of affidavits to hold to bail in the case of *Warmesley v. Macey*; where, his Lordship observed that (b) "it was a well-known principle, that a subsisting and sufficient cause of action must be shewn, and that the plaintiff had a right to arrest the defendant at the time the affidavit was sworn; and that as to what should be a sufficient cause, must depend on the subject matter of the action." However, it is not necessary that the affidavit should be confined to express or precise words: if it amounts to a statement that a debt is due, it is equivalent to stating that it is unpaid. Here, enough appears on the face of the affidavit to hold the defendant to bail, and there is, consequently, no ground for this application.

Mr. Justice PARK.—I am of opinion that the affidavit is sufficiently certain, as it is stated that the defendant was indebted to the plaintiff by virtue of a charter-party,

(a) 1 Barn. and Cress. 108; S. C. 2 Dow. and Ryl. 69.

(b) *Ante*, Vol. V. 55.

bearing date on a certain day, for and on account of the hire of a ship therein named, let to hire by the plaintiff to the defendant, and by him taken for a certain voyage. It is therefore fully stated on what account the defendant became indebted, viz. for the hire of a ship which had been let to him by the plaintiff, by virtue of and according to the terms of the charter-party.

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Mr. Justice BURROUGH.—The latter part of the sentence must be considered as independent of the former, and sufficiently expresses the nature of the debt which arises on the charter-party, viz. the hire of the vessel for a certain voyage from *Leith* to *Poyais*.

Rule refused.

WILLIAMSON v. HENRY MICHAEL GOULD.

Tuesday,
May 6th.

MR. Serjeant *Lens*, on a former day in this Term, obtained a rule, calling on the plaintiff to shew cause, why the indenture of annuity of 590*l.*, granted by the defendant to the plaintiff on the 22nd *December*, 1813, and the securities whereon it was founded, might not be set aside, and the deed and warrant of attorney delivered up to be cancelled; and that all proceedings on the judgments which had been entered up for securing the annuity might be stayed, and the judgments vacated, on the grounds, 1st, that the true pecuniary consideration was not set forth in the memorial; 2ndly, that part of the consideration money had been retained; and, lastly, that the proportions of the annuity payable to those who were

Where, on the grant of an annuity, a considerable portion of the consideration money was retained by, or returned to the agent of the grantee, for the expences of preparing the deeds and for journeys, &c.:—Held, that this was an illegal retainer, altho' the grantee swore that no part of the consideration

money was retained or kept back by his direction, authority, or privity, (he should have gone further, and stated that none was returned); and the Court set aside the annuity, notwithstanding ten years had elapsed since it was granted, and the grantor had acquiesced in its payment during that period;—on the terms of an account being taken before the Prothonotary, who was to ascertain what sum might be due to the grantee in respect of principal and interest.

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beneficially interested were not named in the indenture or memorial. He founded his motion on an affidavit of the defendant, which stated, that in *September*, 1813, he was much embarrassed in circumstances, and greatly harassed to discharge certain arrears of annuities which he had granted, charged upon his estates, to various individuals for his life, through the medium of one *Edward Howard*; and that he was particularly pressed by *Howard* for payment of 2,290*l.* as due to six persons, to whom annuities amounting to the annual sum of 2000*l.* had been previously granted: that in *August*, 1813, he was indebted to *Howard* in 400*l.*, which was a private debt for money lent by *Howard* to him in that month; for securing the payment of which, with interest, he executed to *Howard* his warrant of attorney: that subsequently to *September*, 1813, he being again pressed by *Howard* for payment of the arrears so due on account of the several deeds of annuity, he contracted with *Howard* that he should procure a further advance for the defendant of 3,130*l.*, for which he should grant an annuity during his life to the person advancing the same at the rate of 14½ *per cent.*: that it was agreed between him and *Howard*, that the former should, out of the 3,130*l.*, discharge to the six persons the arrears so due on account of their several deeds of annuity, amounting to about 2,290*l.*; that *Howard* should retain and pay himself the 400*l.* so due to him by the defendant for the loan of the money advanced to him, with interest; and that he should pay to *Howard* a sum, to be computed at the rate of 10*l. per cent.* on the 3,130*l.* for his commission or procuration money on the advance of that sum. That on the 22d *December*, 1813, the defendant met, by appointment, at *Stroud*, in *Gloucestershire*, one *James Gibbs*, who had about that time entered into partnership with *Howard*, for the purpose of the defendant's receiving the 3,130*l.*, and for executing the necessary instruments relative to the grant and security of the

annuity. That, on the same day, *Gibbs* having declared himself to be the agent of the plaintiff and other persons, for whom the plaintiff was to become a trustee by virtue of the proposed annuity, produced to the defendant an engrossment of a proposed grant of annuity, whereby the defendant was to charge certain estates which he held for life, as also 12,000*l.* 3 *per cent.* Consolidated Bank Annuities, in which he was entitled to an interest for life, then outstanding upon security of land, with an annuity or annual payment of 590*l.* to the plaintiff, in consideration of 4,130*l.*, to be paid to the defendant on his executing the securities; upon which the defendant expressed his astonishment at the alteration and increase of the sum as stated to be the consideration-money, as well as the amount of the sum stated in the engrossment to be the annuity to be paid by the defendant to the plaintiff; when *Gibbs* accounted for the alteration, by stating, that, upon taking an account of the sums due to the six former annuitants, it appeared that they amounted to 1000*l.* more than *Howard* had at first calculated, and that, therefore, *Gibbs*, by *Howard's* direction, had increased the principal of 3,130*l.* first proposed to be raised, to 4,130*l.*, and had in like proportion augmented the annuity to be paid by the defendant to the plaintiff, calculating it at about the rate of 14½ *per cent.*, which made 590*l.*, to be paid annually. That after much angry discussion, and after *Gibbs* had threatened the defendant with legal proceedings on account of the sums owing by him, and declaring that if he declined or delayed executing the deed so prepared, he would be taken in execution for such sums, he did execute an indenture of annuity, made between himself of the first part, the plaintiff of the second, the six other persons whose names were set out in the schedule thereto annexed of the third part, *Howard* of the fourth part, and one *Cooke* of the fifth part; and that the deed set forth, that in consideration of 4,130*l.* paid to the defendant by the plaintiff,

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the former granted to the latter, his executors, administrators, or assigns, one annuity or yearly sum of 590*l.*, to be issuing and chargeable upon certain freehold estates of the defendant, to hold to the plaintiff, his executors, &c. during the defendant's life ;—that it was further declared by the indenture of annuity, that the 4,130*l.* was the proper money of the plaintiff and the several persons whose names were mentioned in the schedule thereunto annexed, in the several proportions therein specified, and that the plaintiff's name was made use of in trust as well for them, as for his own use and benefit.—That at the time of executing the said indenture of annuity, *Gibbs*, as agent to the plaintiff, produced and laid out upon a table where the defendant so executed the indenture, a quantity of Bank of England notes, to the amount of 4,130*l.*, and then and there indorsed the numbers of them upon the back of the indenture: that *Gibbs*, then acting as such agent to the plaintiff, kept, took, and retained out of the said sum of 4,130*l.*, 2,290*l.*, the arrears then due on account of the former annuities, and also 400*l.* due by the defendant to *Howard*, with interest thereon, together with a further sum of 450*l.*, of which *Gibbs* declared that 413*l.* was due to *Howard*, as agent of the plaintiff, for the procuration or commission-money, and for costs in preparing the securities, at the rate of 10 *per cent.* on such 4,130*l.*; and that the residue of the 450*l.* was chargeable against the defendant for the travelling expences and trouble of *Gibbs* and two other persons who accompanied him to *Stroud* to witness the execution of the securities. That *Gibbs*, so acting as agent to the plaintiff and *Howard*, after such deductions, paid to the defendant 990*l.*, or thereabouts, being the balance of the 4,130*l.* then remaining, after deducting thereout the several sums above-mentioned; which sum of 990*l.* was the only part of the 4,130*l.* that ever came to the defendant's hands, or was under his power or control: that neither the indenture of annuity, or memorial thereof, set

forth or stated that the several sums of 2,290*l.*, 400*l.*, and 450*l.*, were paid, discharged, or liquidated, from the 4,130*l.* That no grant of any annual sum to be paid to the various persons in consideration of their advancing those several shares and proportions of the 4,130*l.* so set forth in the schedule, were set forth or stated in the indenture or memorial: that the defendant never saw the plaintiff, nor any of the parties whose names were set forth in the schedule, from the time of contracting for the grant of the annuity of 590*l.* until and after the execution of the indenture; but that *Gibbs*, as the partner of *Howard*, conducted the whole transaction on the behalf of the plaintiff and those persons whose names were set forth in the schedule; and that neither *Gibbs* nor *Howard* were at any time the agents for the defendant in that or any other transaction.

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Mr. Serjeant *Vaughan*, and Mr. Serjeant *Taddy*, now shewed cause, on an affidavit of the plaintiff, which stated, that he having been in the habit of laying out money by way of annuity through the agency of *Howard*, he was, in the year 1813, applied to by him to purchase a portion of the annuity to be granted by the defendant. That some time in the month of *December*, in that year, he paid, or caused to be paid to *Howard*, 805*l.* for the purchase of an annuity of 115*l.* *per annum*, parcel of such annuity; and that no part of the consideration or purchase-money was by the direction or authority, or with the consent or privity, or to the knowledge of the plaintiff, retained or kept back, and that to the best of his knowledge and belief, none of the consideration-money was retained or kept back from the defendant, but that the same and every part was, as he verily believed, paid into his proper hands.—There were also affidavits by *Gibbs*, *Whitehead*, a clerk to *Howard*, and *Berry*, one of the subscribing witnesses, who attended the execution of the deed at *Stroud*; and which stated in substance, in contradiction to that of the

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defendant, that the latter authorised *Howard* to raise the above sum of 4,130*l.* for the purchase of an annuity of 590*l.*, to be granted by him, and that it was agreed that Sir *George Goold*, the defendant's brother, should become surety for the due payment thereof. That the meeting at *Stroud* was appointed by the defendant himself, and that *Gibbs*, by the direction of *Howard*, attended him there, accompanied by two of *Howard's* clerks, who went to attest the execution of the securities, and see the consideration-money paid to the defendant. That after the securities were executed, the whole of the consideration-money was actually paid to the defendant by *Gibbs* in Bank of *England* notes, in the presence of both the clerks, and that they saw him receive and put the same into his pocket, when they left the room, and that the defendant's brother, Sir *George Goold*, was present during the whole of the transaction.—*Gibbs* also swore that he was not in any manner authorised by the plaintiff, or any other person or persons interested in the annuity, to keep back or retain any part of the consideration-money, and that no part of it was retained or kept back, but that the whole was really and *bond fide* paid into the hands of the defendant. That after the securities had been executed, and the consideration-money paid, the defendant requested *Gibbs* to let him know the amount of the arrears to be then paid in respect of the prior annuities, as well as the amount of the advances made to him by *Howard*, and the costs attending the negotiation of the annuity in question. That *Gibbs* then handed him the following account:—

Amount of arrears due on prior annuities	£2,272	14	0
Amount of cash lent and advanced by <i>Howard</i>			
to the use of the defendant	625	0	0
Amount of monies to be paid at the defendant's request and on his account, to Messrs.			
S. and Co. and Mr. G.	64	6	0
Amount of Mr. <i>Howard's</i> charge	350	0	0
	£ 3,312	0	0

That the defendant never objected to the last-mentioned charge. That no agreement was ever entered into for the defendant's paying 10 per cent. commission or procuration-money, and that no such sum had ever been paid by him either to *Howard* or *Gibbs*. That no angry discussions took place at *Stroud*, neither was there any threat of legal proceedings against the defendant, nor did he express his surprise at the amount of the sum raised for him, but on the contrary, expressed a wish that it had been to a larger amount; and that the numbers of the Bank notes paid to the defendant for the consideration-money were indorsed by one of *Howard's* clerks in *London*, previously to the departure of *Gibbs* for *Stroud*.—The plaintiff's attorney also swore, that in *June*, 1817, the defendant was discharged from the King's Bench Prison, under the Insolvent Debtors act; and that in the schedule signed and sworn to by him on his taking the benefit of that act, the sum of 4,180*l.* was therein set forth as a debt due to the plaintiff as the consideration-money paid to the defendant for the annuity; and that no objection was stated in the schedule to the justice or validity of the debt, although in the printed form of the schedule, a column was set apart for the express purpose of inserting therein any objections to any debt mentioned and comprised in such schedule: That the defendant was discharged from the Fleet Prison, under the Insolvent act, in *May*, 1818, from former debts omitted in the first schedule, and from other debts contracted subsequently to his first discharge in 1817; and that in a statement of the affairs of the defendant, prepared under his direction, and by him delivered or transmitted to all his annuity creditors in *December*, 1818, he set forth the sum of 4,180*l.* as the consideration-money paid to him for the purchase of the annuity granted to the plaintiff.

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It was submitted for the plaintiff, that although the proportions of the annuity were not set out in the inden-

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ture or memorial, still that the names of all those who were beneficially interested were inserted in a schedule to the deed, which was a sufficient compliance with the terms of the 2nd sect. of the stat. 53 Geo. 3, c. 141, and was an answer to the last objection which had been raised for the defendant as to the validity of the annuity. The most material parts of the defendant's affidavit have been completely answered and negatived. It is quite clear that *Howard* acted as the agent of the defendant in procuring the annuity in question, as the application for it emanated from him alone, and *Gibbs* might be considered as the agent of all parties at the time the securities were executed and the consideration-money paid over to the defendant. With respect to the retainer of part of the consideration-money, it must be observed, that the annuity was granted nearly ten years since, and no objection was raised by the defendant until the present application was made. On the contrary, the defendant acknowledged it as a valid and subsisting charge; and the Court, therefore, in the exercise of their equitable jurisdiction, will not interfere to set it aside after so great a length of time. In *Ex parte Maxwell*, which was an application to set aside an annuity, Lord *Kenyon* said (a), "The Legislature, for the safeguard of the subject in their personal dealings with each other, have thought it wise to pass a statute of limitation to personal actions. I know not why that should be disregarded in this more than in other instances." There, the grantee died in the interval between the granting of the annuity and the application to set it aside, but the Court would not allow it to be impeached (the interest having been regularly paid for ten years, without objection), for a supposed defect of consideration, which might have been explained by the grantee if living. If there had been a manifest and apparent defect on the face of the memorial, it might have afforded some ground for the application; but it cannot

(a) 2 East, 87.

be sustained on the mere relation of facts to be made by the parties or witnesses to the deeds. Here, so far from the grantor's having complained, he has invariably acted on the deed ever since the annuity was granted; and having twice taken the benefit of the Insolvent Debtors act, and inserted the consideration-money as a *bond fide* debt due to the plaintiff, he has thereby led his creditors to suppose that this was a valid and subsisting annuity. It must be observed, too, that this application was made on the affidavit of the defendant alone, although it is sworn that his brother was present during the whole of the transaction, and, in the course of the last Term (a), he sought to be discharged out of custody as his surety on payment of the balance due to the plaintiff. If, however, the present application should be granted, and the whole of the annuity vacated, he will be entitled to his discharge. With respect to the retainer or return of part of the consideration-money to *Gibbs*, it must be considered that the statute 53 Geo. 3 was passed in aid and relief of the subject; and the words of the sixth section, as applicable to this case, are, that "if any part of the consideration shall be returned or retained, the Court may order the deeds to be cancelled." Here, the person advancing the money was the plaintiff; and it cannot be presumed for a moment that any part of it was returned to or retained by him. But it has been said, that although it was not returned to him in substance, yet that there was an undue retainer by *Gibbs*. But it must be clearly shewn that *Gibbs* was the plaintiff's agent for that purpose; but the plaintiff denies having any participation in the transaction, or that any part of the consideration-money was retained or kept back from the defendant to his knowledge. It is true that an authority may be either express or implied; but here, the whole of the transaction between the parties must be looked at; and so far from

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(a) *Ante*, Vol. VII. 579.

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such an implication being raised it must be altogether secluded, for *Gibbs* was only placed in the situation of agent to secure the annuity to the plaintiff, and not to render it invalid or void by an undue and illegal retainer. Although in *Drake v. Rogers* (a), the Court set aside the securities on which an annuity was founded, twelve years after the execution of the deed, yet there the defect was apparent on the face of the memorial, and the whole of the transaction was bottomed in fraud. Although it appears that 350*l.* was paid to *Gibbs* as the amount of *Howard's* charge in negotiating the annuity, still it cannot be traced to the plaintiff, nor can it be presumed that he has received any part of it, or derived any benefit from it. It was returned to *Gibbs* for the expences incurred in investigating the defendant's title, preparing the securities, and for travelling expences, and consequently no part of the consideration-money has been returned to the party advancing the same. *Gibbs* was the agent of the defendant, who agreed to pay the expences of preparing the securities, as well as those attending their execution: the plaintiff had nothing to do with the transaction. And in *Morrys v. Leake* (b), where it was agreed between the grantor and grantee that the former should pay the expences of the writings, and he, immediately after receiving the consideration-money, paid the fair charges of the writings out of that money, it was held that no notice need be taken of it in the memorial, but that it might be there stated that the whole consideration-money was paid to the grantor; and Lord *Kenyon* there said (c), "if any part of the consideration be kept back, under whatever colour, or if there be any improper concealment with the view of eluding the vigilance of those who are to examine the transaction, the whole is void. But, here, all the

(a) *Ante*, Vol. IV. 402; S. C. 2 Brod. & Bing. 19.—(b) 8 Term Rep. 411.—(c) *Id.* 415.

consideration-money was paid to the grantor, who, being indebted to the person who drew the writings for the expense of those writings, under a previous agreement, immediately paid the amount of the bill: it was a payment to his attorney under the previous contract. There is nothing more unreasonable in this, than in his paying any other debt after receiving the consideration-money for the annuity." That is directly applicable to the present case: and although it has been objected, that the proportions of the annuity were not set forth in the memorial, yet the statute 53 *Geo. 3* has been strictly complied with, and the form therein prescribed most rigidly adhered to; and that statute was passed to avoid the difficulties which had previously occurred from stating the different proportions and trusts as required by the 17th *Geo. 3*, c. 26.

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Mr. Serjeant *Lenz* and Mr. Serjeant *Cross*, in support of the rule, were requested by the Court to confine themselves to the point as to whether there had been any case in which the Courts had interfered, where the securities had been acquiesced in for more than ten years, and the objection was not apparent on the face of the memorial. They referred to *Gowland v. De Faria* (a), where the grantee, for the inadequate consideration of 1500*l.*, induced the grantor to grant him an annuity of 200*l.* for 999 years from the decease of the grantor's mother, and the grantee received the annuity for twenty-five years. Sir *William Grant* said, "I believe there is no case in which during the continuance of the same situation in which the party entered into the contract, acquiescence has ever gone for any thing;—it has always been presumed, that the same distress which pressed him to enter into the contract prevented him from coming to set it aside, and that it was

(a) 17 *Ves.* 24.

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17 Geo. 3, c. 26: and Mr. Justice Roke there said (a), "the transaction was *bona fide*, all parties meant honestly, and the grantee of the annuity deposited the money in the hands of the agent and put it out of his own power." The ground upon which I rest my opinion on this part of the case does not depend on the contradictory facts, but on the affidavit of the plaintiff himself who is the grantee of the annuity. Gibbs was his agent as well as the defendant's to a certain extent. He might, therefore, be considered as a common agent of both, and having duties to fulfil with equal integrity to each. For the plaintiff, it has been said, that he has shewn that the money was paid to Gibbs in notes or in some other way, as he has sworn that he had paid or caused to be paid the consideration-money to him. If it had been paid in money to Gibbs, or by a check or bank-notes, the particular description, as well as the time and place of payment, should be specified, and that it was paid to him for the purpose of being paid over to the grantor. The affidavit, however, is defective in that respect. It has been contended that no part of the consideration-money has been retained so as to bring this case within the meaning of the statute, as it was done without the knowledge or consent of the grantee; but it is not stated in any part of the plaintiff's affidavit that no part of the money was returned, and the words of the act are, "that no part of the consideration shall be returned or retained." It appears, too, that the plaintiff had general dealings with Gibbs. The payment, therefore, cannot be taken as having been made to the defendant on his own account, but must be considered as analogous to those cases where an agent is employed to receive and pay money, or, in other terms, acts as such in the mere passing of a certain sum in account. On the whole, therefore, I am not satisfied with the affidavit of the plaintiff, as it should have been more explicit, and sa-

(a) 2 New Rep. 147.

tisfactorily explained this part of the transaction. The case of *Gonland v. De Faria*, appears to me to be decisive as to the length of time that has elapsed since the annuity was granted; and from all the circumstances disclosed, as attending this transaction, I think the Court ought not to suffer an annuity to exist which has been so fraudulently obtained, and that the deed and other securities on which it is founded must be set aside, on the defendant's paying back the principal he actually received, together with whatever interest may be due thereon, which must be ascertained by taking an account before the Prothonotary.

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Mr. Justice PARK.—I am of the same opinion. Until the objection was raised as to whether the time which has elapsed since the negotiation of the annuity would prevent the Court from interfering, unless there was a defect in the memorial, I scarcely entertained a doubt; for all the observations made in the former part of the argument would tend to defeat the object of the statute if they were allowed to prevail; and although the time that has elapsed has been most strongly pressed upon the Court, and *Ex parte Maxwell* (a) has been relied on as being decisive on that point, still, all that seems to have been decided there was, that an annuity paid without objection for more than six years should be protected by analogy to the statute of limitations against any such objection, *dehors* the memorial, without strong reasons to the contrary. There, too, the grantee was dead, and the witness to the deeds was a mere servant, and knew nothing of the transaction. It therefore appears, that the Court in that case laid down no general rule on the subject; and although in other cases, the limitation as to the time in which actions are to be brought is positively fixed by statute, still, in cases of annuities, the Courts have frequently interfered to set them

(a) 2 East, 85.

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aside over ten or twelve years after they have been granted, where there has been no particular hardship in the case. It is true, an exception may be justly made in cases where the grantee and witnesses attesting the securities are dead; and Lord *Knyon* said (a), "during the life of the grantee no objection was taken to the annuity, and the interest was regularly paid, and this has been continued to be done for near seven years since his death, (which happened in *January*, 1794;) down to the middle of the year 1800. And now, for the first time, it is attempted to rip up the whole transaction for a supposed defalcation in the payment of the consideration-money. I know not where such a mischief is to stop if this could be permitted;" and the Court, considering it to be a case of particular hardship, refused to interfere to set aside the annuity. The case of *Drake v. Rogers* was lately before this Court, where an objection was raised to the form of the memorial, as it appeared that part of the consideration for the annuity consisted of a draft payable at a banker's, and it was not stated at what time it was payable, or whether it had been paid or not; and the Court set aside the securities, although the application for that purpose was not made until 12 years after the annuity was granted, and it was found as a fact that both the witnesses attesting the execution of the deed were dead, yet the Court, considering all the circumstances, relieved the grantors, according to the discretionary power vested in them for that purpose. However large a discretion the Courts may have in questions of this nature, yet it has always been exercised with regard to general principles and rules of law. Cases of this description, however, must depend on their own peculiar circumstances. Without therefore going through all the matters of the affidavits in this case, but taking the whole of the transaction between these parties together, there can, I

(a) 2 East, 87.

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think, he no doubt but that this was a fraudulent dealing. It appears that the defendant being in distressed circumstances was in most urgent want of money; the manner in which it was advanced to him, has been sworn in the most guarded manner; for both the plaintiff and *Berry*, instead of swearing that no part of the consideration-money was kept, retained, or returned, cautiously drop the sentence at the word *retained*, and neither of them swear that it was not returned by the grantor. It is true that *Berry* said he put it into his pocket; that unquestionably might have been so, but it might have been drawn out immediately afterwards. The defendant has expressly sworn that 450*l.* were retained by *Gibbs* for the procuration and expenses attending the journey and in executing the deeds. This might have been fully and satisfactorily explained by the affidavit of *Gibbs*: he admits that he received 250*l.*, and does not state the nature of the disbursements. It must be observed that there were pre-existing annuities on the same estate, and a title therefore must have been furnished and approved of before the transaction in question took place. I am therefore of opinion that the securities must be set aside, on the Prothonotary's ascertaining what is due from the grantor to the grantee in respect of principal and interest.

Mr. Justice BURROUGHS.—The Legislature has imposed a duty on the Court in cases of this description, and in which it is incumbent on us to watch the proceedings narrowly and strictly, so as to protect persons who are disposed or necessitated to raise money by way of annuity. If the principal does not attend himself and see the consideration-money fairly paid to the grantor, but sends another to act for him in a case of such importance, he must be answerable for the acts of such third person. It is the business of the grantee which is to be transacted, and his money alone is to be paid. The statute provides that the grantee is to pay the

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money for which the annuity is to be granted, and it must be really and actually paid. Was, then, the payment in question a *bond fide* payment? It is true that the money might have been put on the table, and afterwards into the pocket of the grantor: it appears, however, that the moment this was done, two clerks of *Howard's*, who had come down from *London* for the purpose of attesting the securities, retired from the room, and left *Gibbs* and the defendant there together. It is positively sworn that *Gibbs* afterwards retained 450*l.*: it is but probable and just that the defendant might have returned him his travelling expenses, but *Gibbs* himself has admitted that he received 350*l.* for preparing the securities and investigating the title. This appears to me to be extraordinary, for the title must have been often examined before the annuity in question was granted. If he demanded that sum for merely preparing the deeds, yet it appears that no bill of costs was produced or delivered, or particulars of his demand made out. If that had been done, there might have been some colour for his retaining that sum; but the strong and almost irresistible impression on my mind is, that the money was retained by *Gibbs* as sworn to by the defendant, and I therefore concur with my Lord Chief Justice and my Brother *Park* that the securities must be set aside on the terms as suggested by them.

The Court ordered it to be referred to the Prothonotary to take an account between the parties, and to ascertain what sum was due to the grantee in respect of principal and interest, and to report the balance; and that on the payment of such balance, when confirmed by the Court, the deeds should be delivered up to be cancelled, and the judgment vacated, and all further proceedings stayed; and on these terms the rule was made

- Absolute (a):

(a) See *Mence v. Hammond*, ante, Vol. VI. 491:

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CANNAN and Others v. MEABURN and Another.

Wednesday,
May 7th.

THIS was an action on the case. The first count of the declaration stated, that the plaintiffs, on the 8th December, 1820, at the request of the defendants, caused to be delivered to them seventy-two chests of indigo of the value of 7000*l.*, to be carried and conveyed by them in a certain ship or vessel of the defendants', called the *Lady Banks*, from *Calcutta* to *London*, and there to be delivered to the plaintiffs, for certain freight and reward to be therefore paid to the defendants in that behalf, the dangers and accidents of the seas, and navigation of what kind soever, save risk of boats, so far as ships were liable thereto, excepted. That the defendants received the indigo accordingly for the purposes aforesaid, and that although no dangers and accidents of the seas or navigation of any kind whatsoever prevented the safe carriage and delivery of the indigo, yet that the defendants, not regarding their duty in that behalf, but contriving, &c. did not nor would carry and convey the indigo from *Calcutta* to *London*, and there deliver the same, but wholly neglected so to do; and on the contrary thereof, wrongfully and injuriously carried and conveyed the indigo to the Island of *Mauritius*, and there left the same, which thereby became wholly lost to the plaintiffs. The second count was similar to the first, except in stating in the breach that the defendants sold the indigo at the *Mauritius* for 1000*l.* only, which was 6000*l.* less than it would have been sold for if it had been safely and securely conveyed to *London*, and there delivered to the plaintiffs. To these was added a count in trover; and the defendants pleaded—Not

The captain of a ship has no authority to sell the cargo except in cases of absolute necessity:—Therefore, where indigo was shipped at *Calcutta* consigned to *London*, under a bill of lading, by which the dangers and accidents of the seas, and of navigation of what kind soever were excepted, and the vessel sustained considerable damage in the course of the voyage, and put into the *Mauritius* in a sinking state, where the captain abandoned her, and placed her and the cargo at the disposal of the Vice Admiralty Court, who, after survey, ordered both to be sold; but it appeared that the cargo might have been transhipped there and forwarded to its port of

destination by another vessel, and that his own ship might have been repaired, although at a considerable expence;—Held, that the owners of the ship were liable to the owners of the cargo, in an action on the case for non-delivery thereof at the place of destination, as it was the duty of the captain either to have repaired the vessel, or transhipped the cargo.

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CANNAN
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Guilty.—At the trial before Lord Chief Justice *Dallas*, at *Gutkirkhall*, at the Sittings after the last *Michaelmas* Term, it appeared that the defendants were the owners of the *Lady Banks*, the captain of which had, under a bill of lading entered into at *Calcutta* in the usual form, engaged to carry the plaintiffs' indigo from that place to *London*, as stated in the first count of the declaration. The captain, on being called as a witness for the plaintiffs, proved that the ship's register was 414 tons, and that she had 500 tons of goods on board at *Calcutta*, where the indigo was shipped, and from whence he sailed for *Madras* on the 11th *December*, 1820, where he arrived on the 29th, and discharged 70 tons of goods. That he experienced a heavy gale in the *Madras* roads, from which the vessel sustained considerable injury. That he left *Madras* for *England* on the 11th *January*, 1821, when the ship having again began to make water, he put into *Trincomalee*, for the purpose of repair. That he had to lighten the ship to stop the leak, and that he landed eighty bags of sugar and repaired her there. That the expence of such repairs amounted to 1000*l.*, and that he sold part of the cargo to pay for them, he having no other funds for that purpose. That he stayed at *Trincomalee* a month, and then proceeded on the voyage for this country. That eleven days afterwards the ship again began to make water, and he was obliged to throw part of her cargo overboard. That he afterwards put into the *Mauritius*, where he arrived on the 25th *March* in a damaged and sinking state, and immediately applied to two merchants there, who advised him to put the ship and cargo into the Vice Admiralty Court, to which he assented, and which was accordingly done. That three several surveys were taken. That the first estimate as to her repairs exceeded 30,000 dollars; and that the captain thought it would require at least 40,000 to put her to sea again. That it was necessary to unload the cargo to ascertain the nature of the damage,

which was put into the Government stores at the *Mauritius*, under the custom-house lock, by order of the Vice Admiralty Court there, who afterwards directed a sale of the ship and cargo. That the sale of the indigo lasted two or three days. That he had previously abandoned the ship, and such part of the cargo which was not damaged, for the benefit of the underwriters. That the ship was sold on the 16th, and the indigo from the 21st to the 23d May, by the Registrar of the Vice Admiralty Court, and the proceeds lodged in the registry of that Court. That the captain had no credit or means of raising money at the *Mauritius*; that he did not know whether the ship was insured or not, and that he had no doubt but that the repairs would have far exceeded her value. That if he had not been insured, and the ship and cargo had been his own, he would have acted as he did; but he admitted that there were ships at the *Mauritius*, in which the cargo might have been transhipped and forwarded to this country. The plaintiffs then called the captain of another vessel, who was at the *Mauritius* when the defendants' ship came in, who stated, that on her being unloaded, it was discovered that she had sprung a leak, and that she required caulking and considerable repairs in her copper. That he had then a ship at the *Mauritius* ready to take in her cargo, and that he advised the defendants' captain to put it as well as his crew on board the witness's ship, and have nothing to do with the Vice Admiralty Court, as it would put his owners to unnecessary delay and expence. That he thought the defendants' ship might have been repaired for 2,500*l.* at the utmost; and that she was afterwards repaired by the purchaser, and ready for sea before he left the island, which was in the month of *July*, 1621; and that the repairs were completed in about a month from the time of the sale.

For the defendants, it was submitted, that this could not be considered as a question between the assured and underwriters, but as between the plaintiffs, as owners of the

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cargo, and the defendants in their character of carriers, and that they could only be responsible for a breach of duty resulting from the contract under which the indigo was to be conveyed. That by the bill of lading, the dangers and accidents of the seas were excepted; and that it appeared from the evidence, that the vessel had so far sustained an injury from the perils of the sea, as to warrant the captain in selling her, or, at all events, that there had been no tortious conversion by the defendants, and that they could not be responsible for the acts of their captain. —His Lordship left it to the jury to consider, *first*, whether the captain could have repaired the ship; and, *secondly*, whether the cargo could have been transhipped at the *Mauritius*, so as to have been forwarded to the port of its destination: and he intimated an opinion, that if it could have been so transhipped, the captain was bound to have caused such transhipment to have been made. They found both these points in the affirmative, and accordingly gave a verdict for the plaintiffs.

Mr. Serjeant *Vaughan*, having in the last Term obtained a rule *nisi*, that this verdict might be set aside and a new trial granted, on the grounds, *first*, that the merits of the case had not been decided by the verdict of the jury; and *secondly*, that they had been misdirected by his Lordship: submitted, *first*, that, at all events, the defendants could not be considered responsible for the misconduct of their captain in the sale of the cargo. That they merely stood in the character of owners of the vessel, and that the declaration, although framed in *tort*, was founded on a breach of the defendants' contract, as such owners, for not having conveyed the cargo to its place of destination. That such contract was not only put an end to by the perils of the sea, but fell expressly within the exception in the bill of lading under which the indigo in question was shipped by the plaintiffs' agents at *Calcutta*. The

sale took place under the express direction and authority of the Vice Admiralty Court at the *Mauritius*, and the captain cannot be considered as a *tort-feasor*, as it was not sanctioned by him. The plaintiffs' remedy, therefore, was either against the Judge or officers of that Court, who directed and assisted in the sale. The captain was justified in abandoning the cargo for the benefit of the underwriters, and was not obliged to tranship it. In *Abbott on Shipping* (a), it is stated in terms, that if the captain be prevented from reaching the place of destination, by an injury done to the ship through a peril of the sea, he is at liberty to tranship, but no absolute duty is imposed on him to do so. Here, the voyage was terminated by the state the vessel was in at the *Mauritius*; and when the cargo was deposited in the storehouses there, the captain became the agent or servant of its owners, and was not bound to tranship it as stated by his Lordship to the jury.

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Mr. Serjeant *Lens* and Mr. Serjeant *Taddy* now showed cause. The questions submitted to the jury at the trial were not only most properly left, but their verdict directly meets the justice of the case, and consequently cannot be disturbed. The question of law as to the duties or responsibilities of the defendants does not arise; and according to the terms of their engagement, they were bound, as owners of the vessel, to have conveyed the indigo in question to its place of destination, and could only be excused from so doing, by an actual loss from perils of the sea. But, on the contrary, it appears from the evidence that no such loss had taken place, either in all or in part, or through any of the dangers contemplated by the shippers at the time of the shipment. By the sale at the *Mauritius*, the cargo was altogether taken out of the control of its owners; and although it may be said that the defendants were ex-

(a) 4th Edit. 251.

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cused from the completion of their contract by the exception in the bill of lading, and that they were not bound to deliver the cargo absolutely as in a case between the assurer and assured; still, an unconditional obligation was imposed on them to carry at all events, unless the completion of the voyage was wholly and absolutely prevented, and rendered impossible by the perils of the sea. Although the ship might have received considerable damage, it did not prevent the delivery of the cargo; and although it might have been deteriorated or received some damage, yet it might have been transhipped and delivered in its damaged state, or that part only might have been sold, and that which had received no injury should at all events have been forwarded. The sale, too, was effected without the knowledge, privity, or consent of the owners of either the ship or cargo; and it appears that the vessel was afterwards repaired by the purchaser; she might, therefore, have proceeded on her voyage, and brought home the whole of the cargo after such repairs had been effected. At all events, it was the duty of the captain to have transhipped it on board the vessel offered him for that purpose; and although he adopted another and unjustifiable course, it affords no excuse for the defendants, as his owners, nor can they be relieved from their liability by any of the proceedings which took place in the Vice Admiralty Court, as it appeared from the different surveys made under the direction of that Court, previously to the sale, that the ship might have been repaired; and although the expence attending such repairs might afford a vindication for the sale as between the captain and his owners, still it would form no ground of excuse with regard to the plaintiffs, as owners of the cargo. Independently of that, however, it is quite clear that the Vice Admiralty Court had no jurisdiction or authority to issue any order, even for the sale of the ship, and much less so of the cargo.

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That was expressly decided in *Reid v. Darby* (a), the correctness of which decision has never since been doubted or impugned. It is therefore immaterial to consider whether the sale was effected under the sanction of that Court or not; and as it was made illegally and unjustifiably, it is of itself evidence of a conversion, as far as regards the plaintiffs, as the owners of the cargo. The authority and duty of the master of a vessel, in cases of this description, was most ably and luminously explained by Sir *W. Scott* (now Lord *Stowell*) in the case of the *Gratitudine* (b), who ruled that the utmost he can do, even in a case of extreme necessity, is to hypothecate the ship and cargo, but that he is not authorised to proceed to an absolute sale. But the verdict of the jury is decisive on this point; for they have found that the cargo might have been transhipped and carried to its place of destination, in which case only the obligation imposed on the defendants, as carriers, would have terminated and been fully completed. The cases of *Wilson v. Millar* (c), and *Wilson v. Dickson* (d), are decisive to shew that a captain is not justified in selling the cargo at a foreign port, although it be impossible to prosecute the original voyage, and although a sale might be the most beneficial course for the owner. In the former, Lord *Ellenborough* said, that "nothing but extreme necessity would warrant the master in making a sale of any part of the cargo; and he would not say that even extreme necessity would have warranted him in selling the whole: that he might have raised something by way of hypothecation, but that he was absolutely a stranger to the dominion over the ship and goods, and was bound to send back to receive the further directions of the owner, although the consequence might not be so beneficial to the latter." Here, however, no such necessity existed, as the indigo was

(a) 10 East, 143.—(b) 3 Rob. Adm. Rep. 240.—(c) 2 Stark. N. P. C. 1.—(d) 2 Barn. & Ald. 2.

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neither destroyed nor deteriorated in value; and although it might have been inconvenient and expensive to tranship it, still the captain had the full means of doing so; instead of which, he consented to its sale by the Vice Admiralty Court, and thus wholly deprived the owners of any property they might have in it, although the ship itself might have been repaired, and the cargo conveyed in her to its destined port. This, therefore, clearly amounted to a conversion as far as regards the plaintiff's right to recover in this action, or, at all events, renders the defendants liable to them for a breach of duty under the second count of the declaration. By taking an obligation on themselves to convey the indigo, they were bound to have seen it properly executed; and as the captain was their agent for this particular purpose, they were responsible for his acts; and he had not only no discretion vested in him to sell, but was most properly advised not to go into the Vice Admiralty Court as it might tend to prejudice his owners. In *Abbott on Shipping*, it is said, that (a) "the disposal of the cargo by the master is a matter that requires the utmost caution on his part. He should always bear in mind that it is his duty to convey it to the place of destination. This is the purpose for which he has been entrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act, that is not properly and strictly in furtherance of this duty, is an act, for which both he and his owners may be made responsible: and the law of England does not recognize the authority of any tribunal, or officer, acting upon his suggestion or at his instance, but will scrutinize their acts as much as his own." And the case of *Hunter v. Prinsep* (b), and several other authorities are quoted in support of that doctrine. Again, it is there said (c), that "if by reason of the damage done to the

(a) 4th Edit. 251.—(b) 10 East, 372.—(c) *Abbott*, 251.

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ship, or through want of necessary materials, she cannot be repaired at all, or not without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination. But if his own ship can be repaired, he is not bound to send the cargo by another, but may detain it till the repairs are made, and even hypothecate it for the expence of them; that is, supposing it not to be of a perishable nature: if it be of such a nature, he ought either to tranship or sell it, according as the one or the other will be most beneficial to the merchant." In the case of the *Mercurius*, Sir William Scott said (a), "The master certainly is the agent of the owner of the vessel, and can bind him by his contract or his misconduct; but he is not the agent of the owners of the cargo, unless expressly so constituted by them. In cases of insurance and in revenue cases, where, it is said, the act of the master will affect the cargo, it is to be observed, that the ground on which they stand is wholly different. In the former, it is in virtue of an express contract which governs the whole case; and in revenue cases it proceeds from positive laws, and the necessary strictness of all fiscal regulations." Except, therefore, in cases of insurance or the revenue, the captain can only be considered as the agent of the owner of the ship and not of the cargo. Connecting the facts of this case with justice and principle, although the captain might not be bound to tranship, still it was his duty, under the circumstances, to have used every means in his power to forward the cargo, which he was bound by the bill of lading to deliver, unless he was altogether prevented from so doing by the perils of the sea; and as an offer was made him for that purpose, it takes it out of the exception, and the captain must be considered as standing in the situation of a carrier by land, who, if his waggon breaks down in the course of a

(a) 1 Rob. Adm. Rep. 44.

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journey, is bound to forward the goods by another, until they arrive at their place of destination.

Mr. Serjeant *Vaughan*, in support of the rule, submitted, in the first place, that the owner of a ship could not be bound to repair at all events, and at any sacrifice, in a case as between him and the owners of the cargo. *Secondly*, that the captain was not bound to tranship by any legal obligation; and, *lastly*, that under the circumstances, the defendants, as ship owners, could not be deemed responsible for the acts of their captain, as the relation in which he stood to them as agent or servant had ceased at the *Mauritius*, and that the voyage had terminated by the perils of the sea. From the moment the vessel arrived there, the captain ceased to be an agent to his owners; and even if he had been guilty of a tortious act, he alone is liable: and the case of *Wilson v. Dickson* is decisive to shew, that if a loss be occasioned by the misconduct of the master, who was also part owner, it will not incur any liability on his joint owners beyond the value of the ship and freight. Here, the action, though laid in *tort*, is founded on the contract contained in the bill of lading, and on which the declaration is framed; and it is expressly alleged, that although no dangers or accidents of the seas prevented the carriage of the goods, yet that the defendants would not carry and convey them. The word *carry* can only apply to the particular vessel in which the goods were shipped, and the defendants were not bound to tranship or cause them to be carried by another vessel. Although the ship might have been repaired, the expence attending such repairs should be looked at; and though it might have been the duty of the captain to use every means in his power to bring home the cargo, in a case as between the assured and the underwriters, still it was a far different question as between him and the owners of the cargo. In the former case, if the

cargo had been transhipped, and was afterwards lost, the policies would be altogether void.—

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[Mr. Justice Park.—In *Plantamour v. Staples* (a), it was decided that the owners of goods insured were not precluded, by the act of shifting the goods from one ship to another, from recovering an average loss arising from the capture of the latter ship, if they acted for the benefit of all concerned.]

Here, by the terms of the bill of lading, the defendants undertook to deliver the cargo unless prevented by the perils of the sea; and the plaintiffs having averred that there were no such perils, they should have been prepared to prove it in every respect: but it appears that there was an absolute jettison, as it was necessary to throw some of the goods overboard in order to prevent the ship from sinking before she arrived at the *Mauritius*, and when she got there she was in the greatest possible distress. The only fault imputable to the captain is, by his putting the ship and cargo under the control of the Vice Admiralty Court; but the sale was made by their authority alone; and if the Registrar acted improperly in so doing, he alone is responsible in law to the plaintiffs. The adventure was thereby put an end to, and *eo instanti* that Court was put in possession of the ship and cargo, the liability of the defendants, as ship owners, was determined. In the case of the *Gratitude* it was held, that a master might hypothecate his cargo on freight, for repairs in a foreign port, where such repairs were necessary for the prosecution of his voyage: and Sir William Scott there (b) put the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor, and the vessel being unable to proceed, or to stand in need of repairs to enable her to proceed in time:—"In such emergencies, (said that

(a) 1 Term Rep. 611, n.—(b) 3 Rob. 259.

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learned Judge,) the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law, that the cargo should be left to perish without care. What must be done? He must in such case exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted in argument that he is not absolutely bound to tranship; he may not have the means of transshipment; but even if he has, he may act for the best in deciding to sell; if he acts unwisely in that decision, still the foreign purchaser will be safe under his acts. If he had not the means of transshipping, he is under an obligation to sell, unless it can be said, that he is under an obligation to let it perish." It is clear, therefore, he may exercise his discretion; and in a case where a cargo cannot be forwarded or carried farther in the same vessel, in consequence of an injury she may have sustained by the perils of the sea, the voyage is terminated, and the captain, through unavoidable necessity, becomes the agent for the owner of the cargo, and the relative situation of master and servant, as between him and the owners of the ship, then ceases, and the latter cannot be considered responsible for his acts. Sir William Scott also put the case of a cargo not instantly perishable (*a*), but that it could await the repair of the ship, the master being a stranger in a foreign port, and in a state of distress, without an opportunity of communication with the owners or their agent:—"What (asked his Lordship) is his duty under such circumstances? It may be answered generally, to look out for the means of accomplishing his contract, if possible; that is, the safe conveyance of the property entrusted to his care, in *that same vehicle* which he had contracted to furnish. It is admitted, that, though empowered to tranship, he is not bound to tranship." This,

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therefore, differs from the case of a carrier by land, who engages to convey goods entrusted to him to the end of the journey, without being confined to any particular description or change of vehicle for such a purpose; but here, by the terms of the bill of lading, the cargo is to be conveyed by one and the same ship, unless prevented by the perils of the sea. Although the case of *Plantamour v. Stoples* has decided that a policy of assurance is not vacated by a transhipment of the cargo, still, in a case of this description, where the master had no means, and had been actually obliged to throw part of the cargo overboard from the great danger the ship was exposed to before her arrival at the *Mauritius*, he had a clear right to exercise a discretion on the subject, and was at all events not bound to tranship the remaining part of the cargo by another vessel. Although in *Wilson v. Millan* it was laid down by Lord *Ellenborough* that nothing but extreme necessity would warrant the master in making a sale of any part of a cargo, yet there the vessel was captured, and afterwards released, and the remaining part of the cargo, consisting of perishable commodities, was sold at a trifling sum by the captain; and Lord *Ellenborough* said (a), "The owners could not be responsible for the uncommunicated act of the captain, which they could neither approve of nor repudiate; that for the negligence they were equally liable, but that the conversion was his solitary act." So, here, the sale could not be considered to have been made under the authority of the defendants, as owners of the ship, nor as being their act. The captain was only their agent for the purpose of conveying the cargo committed to his charge, and if he has been guilty of a tortious act in acquiescing in the sale, or exceeded his authority in so doing, the plaintiffs have their remedy against him or the Judge or officers of the Vice Admiralty

(a) 2 Stark. 4.

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Court, who sanctioned and directed the sale. Although in *Freeman v. The East India Company* (a), it was held that the captain has no authority to sell the cargo except in cases of absolute necessity, and that a purchaser at such sale acquires no title to property sold under it, yet Mr. Justice Best there said (b), that "in a sea voyage difficulties often occur, from which journies by land are exempt. That the authority of the master of a vessel must increase, in proportion to the difficulties that he has to encounter. That if a storm or accident disables the ship from proceeding on her voyage, and the master finds himself in a country where money can only be procured to pay for her repairs by sale of part of the cargo, the necessity of his crew, as Lord Stowell has expressed it in the *Gratitudine*, forces upon him an authority to sell. So, if the ship be incapable of repair in a foreign port, and the cargo be perishable, or no place can be got to secure it in, although the voyage be at an end, it would be better for the owner of the cargo that it should be sold than left to perish, and the master might in such case sell the whole." That reasoning is precisely applicable to the present case; as it appears that the captain was obliged to unload the whole of the cargo in order to ascertain what damage the ship had sustained, and which was consequently put under the directions of the Vice Admiralty Court, when any control the captain might have had over it was altogether determined; and the expence of the repairs would have been so great as to frustrate the whole adventure. He therefore, most properly, made an abandonment of the ship and cargo; acting in the one case as the agent of the owners, and in the other for the benefit of the underwriters. Although he might have been bound to repair as to the latter, it is a far different question as far as it regards the owners of the cargo; and it cannot be contended for a moment that the

(a) 5 Barn. & Ald. 617.—(b) *Id.* 623.

owner of a ship is bound to incur the expences of repairing her, when it had been previously ascertained that such expences would be so great: and as no legal obligation was imposed on the captain to tranship, the defendants cannot be considered amenable for his acts, and more particularly so, as the sale was effected by the order of the Vice Admiralty Court, which thereby exonerated him from any personal responsibility to the plaintiffs, as the owners of part of the cargo.

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Lord Chief Justice DALLAS.—I told the jury, that under the circumstances, as proved at the trial, it was a duty incumbent on the captain to have transhipped and sent on the plaintiffs' goods, if he could have done so; and they found that he had every means afforded him for so doing. Indeed the facts of this case are as strong as they can possibly be. Another ship was ready at the *Mauritius* to take the whole of the cargo on board, the captain of which actually offered to do so, and forward it to this country. It appears to me that it would be extending the doctrine relative to the duties of the master of a vessel, if, under these circumstances, we were to hold that he was justified in selling the cargo. I think no such distinction exists between owners and their captains as has been contended for by my Brother *Vaughan* in the course of the argument; and it is too much to say that the latter might frustrate the voyage, and leave the cargo half way. It seems to me to militate against sense and justice; and I therefore thought at the trial, that under the facts of this case, the captain was bound to have forwarded the goods. If I was wrong in that opinion, the consequence will be, that there must be a new trial, as the jury adopted it by their finding. I also told them that no valid or legal distinction could be drawn between this and other cases relating to owners of ships and their captains; the duties of whom were most fully and properly pointed out by elementary

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writers in several excellent treatises on this subject. I therefore, on the whole, thought that the defendants, as the owners of the ship, were responsible for the acts of their captain; if I was wrong, as I before observed, there must be a new trial: but, speaking for myself, even after the able argument we have just heard, I am unable to see any just grounds for altering the opinion I before entertained.

Mr. Justice PARK.—I am clearly of opinion that there is no ground for a new trial. My Lord Chief Justice not only most properly left this case to the jury, but he was fully justified by law in so doing. It has been most ably argued by my Brother *Vaughan*, who has principally confined himself to the terms of the bill of lading, by which it has been said that the defendants' contract is limited: that instrument is in the nature of a receipt of goods by the owners of the ship, and by which they undertake to convey them, as in the case of common carriers; and in the eye of the law the owner as well as the master are considered and treated as such, and are chargeable on the custom of the realm. What true distinction can be drawn between them and the owners of a waggon and their waggoner who drives their horses, and for whose acts they are responsible? It is clear that the owners of a ship are equally liable, unless they be excepted by the terms of the bill of lading, which protects them from losses by the acts of God and the King's enemies. It is true that a loss by perils of the sea falls within the former exception; but here the facts of the case altogether rebut such a loss, and the exception cannot be extended by implication. It is a well-known and established principle, that a captain or master of a vessel can only be justified in selling a cargo in cases of extreme, or, I may say, inevitable necessity. According to the law in the times of Lord *Hale* and Lord *Holt*, a great jealousy existed as to the course to be pursued by a captain of a

ship, and the danger to which the owners might be subjected by his acts in a foreign port. In the case of *Tremenhere v. Tresilian* (a), Lord Chief Justice *Hale* held, that the master had no authority to sell the ship or any part of it, and that his sale would transfer no property to the buyer, even in cases of unyielding necessity. That was a case where the ship was in inevitable danger, her tackle and rigging were broken, and there was scarcely any hope of saving her or any part of her. That doctrine, however, has been lately broken in upon; but even now it must be a case of extreme or inevitable necessity to justify the master in proceeding to a sale, and such necessity confirms that general rule. This, however, it must be observed is the rule as to the sale of a ship, but its application is much stronger in a case relating to the cargo. The doctrine, therefore, as laid down by Lord *Hale* appears to me to be rather fortified than otherwise, although it cannot be considered as an established or general rule. The first case in which that question was fully discussed was that of the *Gratitude*, in which Sir *William Scott* delivered one of the most clear and elaborate judgments ever pronounced by a Judge in this country; throughout the whole of which, he considered that the master could only exercise the power of hypothecating or binding the cargo, for the repairs of the ship, in order to effect the prosecution of the voyage, in the case of a severe necessity (b). At the time of that decision, no authority could be found, with the exception of the case of *Justin v. Ballam* (c), which authorised the master to hypothecate the cargo. And in *Reid v. Darby* Lord *Ellenborough* said (d), that "no instance had been discovered in the Admiralty Court at home, nor could any terms be found in the Vice Admiralty commission, or any principle on which the practice could be sustained

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(a) 1 Sid. 452.—(b) 3 Rob. Adm. Rep. 271.—(c) 1 Salk. 34; S. C. 2 Ld. Raym. 805.—(d) 10 East, 120.

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(which certainly, however, had obtained in the Vice Admiralty Courts abroad) of decreeing, upon the mere petition of the captain, the sale of a ship, reported upon survey to be unseaworthy, and not repairable, so as to carry the cargo to the place of its destination, but at an expence exceeding the value of the ship when repaired." And in the case of the *Fanny and Elmira*, Sir William Scott said, with reference to a sale of this description (a): "In the first place, it must be shewn that there was a necessity, and then it remains to be considered whether it was such as by law would give the master a right to sell. That such a case may arise I am not prepared to deny. Suppose, for instance, a ship in a foreign country where there is no correspondent of the owners, and no money to be had on hypothecation to put her into repair. Under these circumstances what is to be done? The ship may rot before the master can hear from his owners; and therefore, if the necessity were clearly shewn, with full proof that every thing was done *optima fide*, and for the real benefit of the owners, the Court might be disposed to sustain a purchase so made." And again (said his Lordship), "In a case of that description, I say, strongly put, where there was no ground for suspicion, although I do not know that such a power is given to the master by the general maritime law, yet, feeling its expediency, this Court would strain hard to support the title of the purchaser; but then there must be the clearest proof of the necessity. It must be shewn not only that the vessel was in want of repair, but likewise that it was impossible to procure the money for that purpose."— Here, however, no such necessity existed to justify the captain to proceed to a sale; for soon after he had put into port at the *Mauritiás*, he had not only an opportunity, but was requested by another captain to tranship his cargo, and he actually offered to take it to this country, together with the crew. Besides,

(a) Edw. Adm. Rep. 117.

it appears that the ship was afterwards repaired, and was ready to proceed on another voyage. Under these circumstances, therefore, I am clearly of opinion that no necessity was imposed on the captain to dispose of the cargo, nor was he justified in so doing. The case appears to me to have been not only most properly left by my Lord Chief Justice to the jury, but that they have drawn a right conclusion.

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Mr. Justice BURROUGH.—I shall add but very few words to what has fallen from my Brother *Park*. I should have entertained no doubt whatever, but for the earnestness of my Brother *Vaughan* in the course of his argument; and having attended to it most particularly, I am clearly of opinion that the law was most correctly laid down by my Lord Chief Justice at the trial, and that the jury have decided rightly on the facts before them. As, therefore, their verdict appears to me to be proper, both in point of law and fact, it cannot now be disturbed, and this rule must consequently be

Discharged (a).

(a) See *Hudson v. Harrison*, ante, Vol. VI. 288; *Read v. Bonham*, id. 597, as to where a sale may be justified by the captain in cases of necessity, either at home or abroad, so as to warrant an abandonment to the underwriters. See, also, *Robertson v. Caruthers*, 2 Stark. N. P. Rep. 571; *Cambridge v. Anderton*, 4 Dow. & Ryl. 203.

DUNSFORD v. GOULDSMITH.

Friday,
May 9th.

MR. Serjeant *Vaughan* moved for a rule to shew cause why the defendant should not be discharged out of custody, on an affidavit, which stated that he was charged in

The Court will not discharge a defendant out of custody in execution at the

suit of a plaintiff, although the application was not made until eighteen months after the death of the latter; it appearing that he had appointed executors who were still alive, and had not consented to the discharge.

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execution at the plaintiff's suit in *February*, 1821; that he still continued in custody; and that the plaintiff had died in *November* in that year. He relied on the cases of *Broughton v. Martin* (a), and *Parkinson v. Horlock* (b), where, after the lapse of a reasonable time from the death of the plaintiff, and no probate or letters of administration had been granted or taken out, or intended so to be, the Court ordered the defendant to be discharged, on notice to the plaintiff's family, and service of a rule *nisi* to that effect, and no cause shewn to the contrary. He also cited *Wagstaffe v. Darby* (c), where a similar application had been granted.

But it appearing that the plaintiff in this case had left a will, and appointed executors, who were still alive, but had not assented to the discharge of the defendant, the Court held that they could not interfere.

The learned Serjeant, therefore, took nothing by his motion.

(a) 1 Bos. & Pul. 176.—(b) 2 New Rep. 240.—(c) 1 Barnes, 366.

Friday,
May 9th.

JONES and Another, surviving Executors of JAMES JONES, deceased, v. RACHEL JONES, Widow.

Where, in a declaration of *assumpsit* by executors, containing fourteen counts founded on promises by the defendant to their testator, it was alleged in the fifteenth, that the defendant, after the death of the testator, accounted with the plaintiffs, as executors, concerning divers other sums due from the defendant to the plaintiffs, as executors, as aforesaid, and then unpaid; and that the defendant being found in arrear upon that account, and indebted to the plaintiffs, as executors, promised them, as executors, to pay:—Held, that on nonsuit they were liable to costs, as they might have sued for the cause of action, as stated in the latter count, in their own right.

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life-time of the testator, indebted to him for principal and interest upon a promissory note, and for monies by the deceased, lent, paid, and had and received by the defendant, and on an account stated, which being unpaid at the time of the death of the testator, the defendant, after his decease, promised the plaintiffs, as surviving executors, to pay them. The fifteenth, or last count, was upon an account stated between the plaintiffs, as such surviving executors, and the defendant, as follows: viz. "that the defendant, after the respective deaths of the testator and deceased executor, accounted with the plaintiffs, as surviving executors, of and concerning divers other sums of money, from the defendant to the plaintiffs, as surviving executors, as aforesaid, before that time due and owing, and then in arrear and unpaid; and upon that account, the defendant was found to be in arrear and indebted to the plaintiffs, as surviving executors, as aforesaid, in the sum of 2000*l.*; and being so found in arrear and indebted, she, the defendant, in consideration thereof, afterwards and after the respective deaths of the testator and deceased executor, undertook and faithfully promised the plaintiffs, as surviving executors as aforesaid, to pay them."—The defendant pleaded, *first, non assumpsit*; and, *secondly, actio non accrevit infra sex annos*; on which issue was joined.

At the trial of the cause, before Mr. Serjeant *Bosanquet*, at the last Assizes at *Monmouth*, the plaintiffs were non-suit, as they were not able to produce the note, it being either lost or mislaid, nor could they prove the exact terms of its contents; and it also appeared that they knew that the defendant was a married woman at the time the note was given to their testator, and there was no sufficient evidence of any promise made by her to revive the debt within six years, or since the death of her husband.

The Prothonotary, on taxation, having allowed the defendant her costs, Mr. Serjeant *Peake*, on a former day in

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this Term, obtained a rule, calling on her to shew cause why the Prothonotary should not review his taxation, on the grounds that she was not entitled to costs. And he cited the cases of *Tattersall v. Groote* (a), *Barnard v. Higdon* (b), and *Booth v. Holt* (c).

Mr. Serjeant *Lawes* now shewed cause; and submitted that the question in this case depended on the terms of the statutes, 23 *Hen.* 8, c. 15, s. 1, and 4 *Jac.* 1, c. 3, as explained by subsequent decisions, which although apparently contradictory, yet the later authorities have established a principle, by which the Prothonotary was fully warranted in allowing the defendant her costs, although the plaintiffs sued in their character of executors. As executors are not excepted out of the former statute, as it relates only to contracts made with the plaintiff, yet it has been uniformly holden, that they are not liable to costs on a nonsuit, where they necessarily sue in their representative character, and cannot bring the action in their own right: and the statute of *James* being framed on the model of that of *Henry* 8, does not extend any more than the latter, to actions brought by executors. The reason why an executor suing in his representative character, if he fail in the action, is not liable to costs, is because he is supposed not to be cognizant of the contracts made by his testator. Although it was once endeavoured to make it the test of an executor's exemption from costs, whether the money, when recovered in the action, would be assets in his hands, it has been repudiated by later decisions, and it is now clearly established that an executor can only be exempt from costs in case of a nonsuit, where he necessarily sues as executor; but that wherever he can bring an action in his own right, without naming himself executor for any one cause in the declaration, he shall not be excused from

(a) 2 Bos. & Pul. 253.—(b) 3 Barn. & Ald. 213.

(c) 2 Hen. Bl. 277.

the payment of costs, although he bring the action as executor, and the sum to be recovered would be assets in his hands. If an executor sue on a bond or deed entered into with his testator, it is necessary for him to declare on it as such, although the breach was assigned in the time of the executor, as such instrument is the cause or foundation of the action, and the plaintiff could not sue without naming himself as executor, he has consequently been held not liable to costs, *Portman v. Came* (a). But in *Goldthwayte v. Petrie* (b), where the plaintiff's wife sued as executrix, for money had and received by the defendant after the death of the testator, to the use of the plaintiff's wife as such executrix, and the defendant obtained a verdict, it was held that he was entitled to his costs, on the ground that it was not necessary to name the wife as executrix, as she might have brought the action in her own right, as it was stated that the money was received and the promises made by the defendant, after the testator's death. So, in *Bollard v. Spencer* (c), Lord *Kenyon* said, that "the rule had been long settled, that where an executor brings trover on his own possession, alleging the conversion after the testator's death, and fails, he must pay the costs, whether he ever had possession of the property or not:" because the gist of the action being the conversion, he was not bound to name himself an executor, but might sue in his own right. The same point was decided in *Hollis v. Smith* (d), and in the subsequent case of *Grimstead v. Shirley* (e); where a declaration in trover by an executor consisted of two counts, the one on a conversion in the life-time, and the other after the death of the testator, for which latter cause the plaintiff might have declared in his own right, and he was nonsuited; he was held liable to costs. The rule there laid down by Sir *James Mansfield* is expressly

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(a) 2 Ld. Raym. 1413; S. C. 1 Str. 682.—(b) 5 Term Rep. 234.
—(c) 7 Term Rep. 358.—(d) 10 East, 293.—(e) 2 Taunt. 116.

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applicable to, and must govern the present; and it is quite clear, that, according to the terms of the fifteenth count, the plaintiffs might have declared in their own right, as the cause of action therein stated might have arisen in their own time, and since the death of the testator. It is founded on an account stated between the plaintiffs, as executors, and the defendant, after the death of the testator, concerning divers sums then unpaid to them, and that being so indebted, the defendant promised the plaintiffs, as such executors, to pay them. The subject matter of the cause of action on which such account arose, might be for goods sold, or money had and received by the defendant to the plaintiffs' use since the death, in which case they need not have sued as executors; so that this case falls expressly within the rule laid down in *Goldthwayte v. Petrie*. The case of *Jones v. Willson (a)*, appears to be precisely in point; where, in an action by an administrator, the declaration contained two counts, one on a promise to the intestate in his life-time, and the other on a promise to the plaintiff himself, and he named himself administrator in both, and was nonsuited, and the defendant applied for costs: it was held that these two counts could not be joined, and that the plaintiff must pay costs, as the nonsuit went to the whole. Although the case of *Bull v. Palmer (b)*, as reported in *Levinz*, may be relied on as an authority for the plaintiffs, yet it appears from the report in *Sir Thomas Jones and Keble*, that the account stated was with reference to a debt due to the testator, and created no new cause of action; whilst here, the account refers to the parties on the record alone: and as the promissory note on which it was founded, appears to have been made so long since as 1806, the plaintiffs were compelled to lay a promise by the defendant after the testa-

(a) 11 Mod. 256.—(b) 2 Lev. 165; S. C. *Sir Thomas Jones*, 47, 3 Keb. 626, 643.

tor's death, which took place twelve years since, so as to take the case out of the statute of limitations.

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Mr. Serjeant *Peake*, in support of the rule, admitted that if the plaintiffs had unnecessarily described themselves as executors, or that it could be assumed that they might have sued in their own right, the defendant would be entitled to costs. But here, the account having been entered into by her, with reference to a debt due from her husband to the testator in his life-time, the plaintiffs were obliged to sue in the character of executors; and the subsequent promise made by the defendant to them, as such, within the six years, did not create a new debt, but merely operated as a ratification of the old one. In all cases where plaintiffs have named themselves as executors and been non-suited, it has been where it was unnecessary for them to have done so; and it has accordingly been considered as surplusage, as in the case of *Goldthwayte v. Petrie*, where it was stated in both counts of the declaration, that the money was received and the promises made by the defendant after the testator's death. It was therefore unnecessary to name the plaintiff's wife as an executrix, as the action might have been brought in her own right. Here, there can be no question as to whether the money, if recovered by the plaintiffs, would be assets in their hands or not; for although the cause of action might have accrued to them after the death of the testator, and they might have recovered on an account stated with them in their own right, yet there is nothing in the fifteenth count to exclude a recovery in the right of their testator, as evidence of an account or acknowledgment made after his death, in respect of the promissory note, could only be admissible under an allegation of an account with the plaintiffs, as executors, and the money when recovered, would be as money had and received by them for his use. So, in the cases in trover, where the conversion was after the death, it was immaterial whether the executor was in

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actual possession of the property sought to be recovered or not, as the whole of the testator's estate vested in him, at the time of the death, and as the conversion was not made until afterwards, it is clear he might have recovered in his own right. Here, however, it does not necessarily follow that the plaintiffs' cause of action arose wholly to them after the death of their testator, or in their own time as executors; for supposing a sum of money to be due on account from a third person to the testator; in an action by his executors on an account stated, and a promise to pay them after his death, such a count would be clearly supportable, as the money sought to be recovered would be due to the executors, as such, on account of their testator. So, here, the evidence attempted to be gone into at the trial would only apply to a revival of the old debt which was founded on the promissory note given to the testator in his life-time; and an executor, to avail himself of a promise within six years, must necessarily state such promise to have been made to himself; in which case, he may shew that his cause of action is founded on a debt originally due to his testator, and that the defendant was indebted to him, as executor, on an account stated after his death. All the authorities on this subject are collected in *Hullock's Law of Costs* (a); and the case of *Bull v. Palmer* appears to be precisely in point. There, the plaintiff, an executor, having been nonsuited in an action of *assumpsit* on an account stated with himself, as executor, after the death of his testator, it was held that he was not liable to costs, and that if he had declared generally upon a *computasset*, he must have been nonsuited. The true distinction was taken by Lord Eldon in *Tattersall v. Groote*; viz. that if an executor must sue as such on a contract made with the testator, he is not liable to the payment of costs, although the cause of action arose after the death of the testator. That was

(a) Vol. I. Second Edit. 185 to 212.

an action of covenant, brought by the plaintiff, as administratrix, on a breach subsequent to the death of the intestate, and on judgment against her on demurrer, it was held, that she was not liable to costs; and the case of *Portman v. Came* was there recognised and adopted. The same principle was laid down in the case of *Cooke v. Lucas(a)*, where the plaintiffs were held to be not liable to pay the costs of judgment as in case of a nonsuit, inasmuch as though the breach happened in their own time, they could only declare as executors upon the contract made with their testator. So, here, it is not necessarily to be implied from the language of the fifteenth count that the cause of action did not arise in the life-time of the plaintiffs' testator, or that it wholly accrued to them in their own time. If it be insufficient or defective, the defendant should have demurred, or moved in arrest of judgment on the ground of a misjoinder; and if the cause of action arose to the plaintiffs in their own right, and it was not necessary for them to be named as such, it is quite clear that that count could not be joined with those which preceded it; but on looking at the whole of the declaration, it is evident that the debt on which the action was founded arose in the life-time of the testator. The Court must therefore presume that the fifteenth count was framed on an account stated, with reference to a contract entered into, and a debt due to the testator in his life-time, which was revived by the defendant by a subsequent promise to his executors, as such; and if there be no ground to arrest the judgment, so there can be no pretence to render the plaintiffs liable to costs. At all events, as the authorities on this point are conflicting, the Court will pause before they come to a final conclusion.

Mr. Justice PARK(b).—This was a motion for the Pro-

(a) 2 East, 395.—(b) Lord Chief Justice Dallas was absent through indisposition.

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thonotary to review his taxation of costs in this cause; but I am of opinion that such taxation was perfectly right, and consequently that there is no reasonable foundation for the application. My Brother *Peake* has requested the Court to consider the question before they came to a decision, but there appears to be no material or reasonable ground for so doing. He mainly relied on the case of *Bull v. Palmer*, which, it must be observed, was decided in the reign of *Charles* the Second, and the reasons there stated by the Court are not supported by modern authorities. Of late years, the object of the Courts has been to restrain the rule which had been before adopted in favour of executors, as to their liability to costs. It is true that in certain cases, where they sue as executors on a promise made to their testator in his life-time, they cannot be deemed liable to costs in case they fail in the action; yet the rule has been laid down by this Court as well as that of the King's Bench, that where an executor or administrator may declare in his own right, and is nonsuited, he is liable to costs. That principle was determined in the Court of King's Bench, in *Hollis v. Smith*, which was decided in 1808, and which was an action of trover, and the plaintiffs declared as administrators on a possession of goods by their intestate, and a conversion in their own time, and were nonsuited at the trial; Lord *Ellenborough* said (a), "The question is, whether it were necessary for the plaintiffs to have declared as administrators? That it certainly was not necessary; for on the death of their testator, they were, in point of law, the owners of goods which belonged to the intestate; and whether actually possessed by them or not before the conversion, that they might declare as any other person upon their own property when wrongfully converted by another;" and they were consequently held liable to costs. This principle was adopted in *Grimstead v. Shirley*, in this Court, in the following year; and Sir *James Mans-*

(a) 10 East, 295.

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field there observed (a), that "there were various and contradictory decisions on this point, but that the later authorities were, that where an executor *may* declare in his own right, he shall be liable for costs;" and his Lordship hoped that that would be the last time the point would be debated here or in any of the Courts. That doctrine has not now been denied; but it has been said, that it was contrary to the opinion of Lord *Eldon* in *Tattersall v. Groat*. That case, however, was decided previously to *Hollis v. Smith*, but it does not support the doctrine now insisted on for the defendant; as there the action was brought on a covenant in a deed entered into with the intestate; and although the breach happened subsequently to his death, and in the time of the administratrix, yet it was necessary for her to set out the deed and sue as administratrix, in order to entitle her to a right to declare on it. The question in all these cases has been, whether, on the face of the declaration, the plaintiff might not have sued in his own right. Can any one doubt for a moment, on the last count of this declaration, that the plaintiffs might not have so done, or that the cause of action, as alleged in that count, did not happen in the life-time of the testator, but accrued to them after his death? It is stated, that the defendant, after the death of the testator, accounted with them, as executors, of and concerning divers other sums of money, from the defendant to the plaintiffs, as executors as aforesaid, before that time due and owing, and then in arrear and unpaid, and a promise by the defendant to pay them accordingly. It is immaterial that the plaintiffs were described as surviving executors, for if they intended to shew that the accounting was of monies due to the testator in his life-time, it should have been stated that such money was due to the testator before that time, and unpaid to the

(a) 2 Taunt. 119.

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plaintiffs, as his executors, after his death. I therefore think that as on the face of this count the plaintiffs' right of action might have arisen in their own time, and they might have declared in their own right, the Prothonotary was perfectly correct in allowing the defendant her costs, and consequently that this rule must be discharged.

Mr. Justice BURROUGH.—In *Bull v. Palmer*, as reported in Sir *Thomas Jones*, it appears that the account stated was concerning a debt due to the testator; that, therefore, puts an end to that case as being applicable to the present. Here, however, it has been insisted that the defendant might have demurred or moved in arrest of judgment, on the ground of a misjoinder; but I think there was no misjoinder: for it does not follow that whatever might be recovered by the plaintiffs under the last count would not be assets. Here, however, the question is, whether the plaintiffs necessarily shewed on that count that they were bound to sue as executors; if not, it would be extremely hard that the defendant should be compelled to pay costs. It is necessary, where persons sue as executors, that they should be held to a strict rule, which must be confined to cases in which they can only sue as such. The plaintiffs should have expressly shewn that they were bound to do so throughout the whole of the declaration; and as they have not, they must abide by the consequences. It was not only their duty but business to shew how the account stood, and that they could only sue on it in their character of executors. From the last count, it appears to me to be clear that the transactions on which the account was stated arose after the death of their testator. Although it might have been in his life-time, it is not so expressed; and it is therefore too much for us to say that they could not bring an action in their own right without naming themselves as executors, or that they must of necessity sue in that

character. I am, therefore, clearly of opinion that the Prothonotary was perfectly right in his taxation; and, consequently, that the defendant was entitled to costs.

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Rule discharged (a).

(a) See *Rose v. Bowler*, 1 H. Bl. 108, where it was held that an executor cannot be charged as such, either for money had and received by him, money lent to him, or on an account stated of money due from him as such, those charges making him personally liable. See, also, *Childs v. Monins*, ante, Vol. V. 282.

ROCHFORD, *Ex parte*, In a complaint against BROWN, Esq.
Warden of the Fleet.

Saturday,
May 10th.

MR. Serjeant *Pell*, on a former day in this Term, obtained a rule, calling on the Warden of the Fleet to shew cause why he should not refund or repay to the applicant or his attorney all monies improperly taken by him for fees, and that he might also pay the costs of this application. He founded his motion on an affidavit, which stated that the applicant had lately been a prisoner in the Fleet, and that he had obtained discharges to all the actions under which he had been detained in custody at the gate of that prison: that, upon such discharges being lodged, he applied to the Warden, in order to pay the gate fees, or any other claim which he might have against him, when the Warden demanded 2*l.* 3*s.* 7*d.*; viz. for his discharge from twelve actions which had been lodged against him the sum of 1*l.* 10*s.*, being the sum of 2*s.* 6*d.* for each of such discharges; 7*s.* 4*d.* for gate fees; and 6*s.* 3*d.* for room rent; making, together, 2*l.* 3*s.* 7*d.*: and that the Warden had detained the applicant until such sum was paid.

The Clerk of the Papers in the Fleet Prison is entitled to a fee of 2*s.* 6*d.* on every action from which a prisoner is discharged, and which is payable under the rule of Court, *Easter and Trinity Terms*, 1727:—and the Court refused to order the Warden to return a sum taken by him on the discharge of a prisoner on account of such fees.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Lawes* now

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shewed cause, on an affidavit of the Warden, which stated, that the complainant having been a prisoner in the Fleet, had obtained discharges in the several actions with which he had been charged, and that he had paid 2*l*. 3*s*. 7*d*. for the fees and customary charges, which had been usually received by his predecessors, as Wardens of that Prison, viz. 7*s*. 4*d*. due to him, as Warden, on a prisoner's discharge, which was constituted by an order of this Court, made in *Trinity Term*, 2 *Geo.* 2, 1729; 6*s*. 3*d*. for room rent; and 1*l*. 10*s*. as the amount of fees due and payable to the Clerk of the Papers, for the applicant's discharges in twelve actions with which he had been detained, at the rate of 2*s*. 6*d*. for each action, and which last mentioned fee was established by a rule of Court made in *Easter and Trinity Terms*, 13 *Geo.* 1, 1727. — Under these circumstances, it was submitted, that there could be no possible ground of complaint against the Warden, as none of the fees could be disputed, except that of 1*l*. 10*s*., which was due and payable to the Clerk of the Papers, according to the rule of 13 *Geo.* 1, and whose duty it was to authenticate the discharge of each prisoner in a book to be kept by him for that purpose, and which fee had been uniformly taken, in respect of every action with which a prisoner might have been charged during the term of his imprisonment; and here the applicant does not deny but that he was charged in twelve different actions. The fee appears to have been established by constant usage, and to have been uniformly paid for nearly a century. It was quite unnecessary for this fee to be enumerated in the list on the table hung up publicly in the prison, as required by the statutes 2 *Geo.* 2, c. 22, and 32 *Geo.* 2, c. 28, as the provisions of those acts applied only to the fees to be taken by the Warden, which were settled by another rule of Court in *Trinity Term*, 1729.

Mr. Serjeant *Pell*, in support of the rule, submitted

that no fees could be legally taken by the Warden, or any of his officers, for the discharge of any prisoner out of his custody, except those which were specifically directed to be hung up in the prison according to the provisions of the above statutes. These acts expressly require a table of all the fees to be hung up in a public place within the prison. Although the sums charged for gate fees and room rent cannot be disputed, yet as that charged as being due to the Clerk of the Papers is not inserted in that table, former usage is entirely out of the question, and it is necessary that a prisoner should be acquainted with and know their precise amount before he applies for his discharge; and as the rule of 1729 applies to fees to be taken by the Warden only, a list of such fees must be publicly exposed in the prison, according to the terms of the statutes which were passed subsequently to that rule.

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The Court, at the conclusion of the argument, observed, that this embraced a question of nicety, and that the Warden would not have discharged his duty if he had not demanded the fees which had been established by an order of Court, and uniformly demanded by and paid to his predecessors, from 1727 to the present time. He was therefore bound as a trustee to those who might succeed him in the character of Warden not to abandon such a fee without the sanction or order of the Court; and more particularly so, as it appears he was justified in demanding it according to law and custom. Still, however, that it was fit to consider the terms of both the rules of Court of 1727 and 1729, as well as the precise and definite nature of the fees required to be hung up in the prison by virtue of the statutes 2 Geo. 2, c. 22, and 32 Geo. 2, c. 28.

Cur. adv. vult.

Mr. Justice PARK now delivered the judgment of the Court as follows:—This was a rule calling on the Warden

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of the Fleet to shew cause why he should not repay to the applicant the sum of 1*l.* 10*s.* which he had demanded and taken for fees which were not legally due to him. The Court having considered the question, are clearly of opinion that this rule must be discharged; for when the case is looked into, there appears to be no difficulty whatever attending it. In the year 1727, there having been controversies between the prisoners and the Warden of the Fleet, the Judges of this Court, consisting of Lord Chief Justice *Eyre*, Mr. Justice *Price*, Mr. Justice *Page*, and Mr. Justice *Denton*, met on three several days, and in *Easter* and *Trinity* Terms, 13 *Geo.* 1, made an order or rule of Court, as to what fees should be then payable to and taken by the Warden or his officers in this particular case; *viz.* that there ought to be paid to the Warden for every prisoner's discharge, as a fee for his dismissal out of prison, without any regard to the number of causes wherewith he stood charged, the sum of 7*s.* 6*d.* and no more: and by the next regulation it was ordered, that there was due and ought to be paid to the Clerk of the Papers, for every discharge of every action, the sum of 2*s.* 6*d.* If that rule is still in force, there can be no colour whatever for the present application; for it appears that the demand in question was not made for the benefit or emolument of the Warden, but as a remuneration to the Clerk of the Papers, for the labours attending the duties of his office as such. In the year 1729, the statute, 2 *Geo.* 2, c. 22, was passed, which made no alteration as to the amount of the fees to be taken. By the fourth section of that act it was enacted, "that no fees should be taken by any gaoler or keeper of any prison in *England* for any prisoner's commitment to gaol, or chamber rent there, or discharge from thence, except what were then allowed by law, until such fees should be settled and established by the Lord Chief Justice of the King's Bench, the Lord Chief Justice of the Common Pleas, and Lord Chief Baron of the Exchequer, for the time being, or any

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two of them, together with the Lord Mayor or two or three of the Aldermen of the city of *London*, in respect of the gaols within that city; who were thereby empowered and directed to settle and establish the same as soon as conveniently might be, and that tables should be made of the respective fees so settled and established; and that the tables of such fees should be signed by the said Lords Chief Justices, and Lord Chief Baron, and the Lord Mayor and Aldermen of the city of *London*; and that such tables should be hung up in some open or public room or place in every gaol, there to remain and be resorted to by every prisoner as occasion should require." That provision was afterwards incorporated into the statute 32 *Geo. 2*, c. 28 (a), commonly called the Lords' Act.—In pursuance of the statute 2 *Geo. 2*, three of the Judges of this Court held a meeting, on the 19th *January*, 1729 (b), and settled the fees to be taken by the Warden on discharge of prisoners in the Fleet from any civil action; by which every prisoner was to pay him for his discharge 7s. 4d., whereas by the former order of 1727 it was settled at 7s. 6d. It appears that the table of fees, since 1729, has been continually hung up in the prison, and that the Warden has never received more than 7s. 4d. on the discharge of each prisoner. It must be observed, that neither the statute 2 *Geo. 2*, nor 32 *Geo. 2*, have made any alteration as to the amount of the fees to be received by the Warden; and the table when settled was to relate to him alone, but did not touch upon those fees which were to be taken by the Clerk of the Papers. By the order of 1727, the fee of 2s. 6d. was to be payable to him for every discharge of every action.—It may, however, perhaps, be said, that this is an indirect taking by the Warden; but on looking to what has lately taken place, we are of opinion that it is not. By the recent report of the Commissioners on the duties, salaries, and emoluments of officers in Courts of Justice,

(a) Section 6.—(b) Reg. Gen. 3 *Geo. 2*.

1823.
ROCHFORT,
Ex parte.

and as to the regulation of which a statute is about to be passed, and which is now under the consideration of the Judges, the office and duties of the Clerk of the Papers in the Fleet Prison are very fully defined; and the Commissioners find under that title, that the sum of 2s. 6d. is taken by him for a prisoner's discharge in each action with which a prisoner has been charged during his imprisonment. They also state that no salary is payable to the Clerk of the Papers, and that the only emolument he derives, is from his fees, the first and principal of which is the sum of 2s. 6d. taken for the discharge of a prisoner from every such action. The Commissioners further state, that this fee was settled by the rule of this Court, in *Easter* and *Trinity* Terms, 1727; that it appears that such fee has been constantly received by the Clerk of the Papers ever since the above rule was made, to the present time; that it constituted part of his salary; and that it was probably an ancient fee at the time the rule was made.—It was natural, however, for the applicant to have resisted the fee demanded by the Warder, in this particular instance, as it was not enumerated in the table of fees hung up in the prison; but the Court having attended to the application with some particular attention, are of opinion that there is no foundation for it. The motion was properly made, and the Warden has not been required to pay costs, although he is an officer of the Court; yet we think that, under the circumstances, this rule should be discharged generally, and that nothing be said with respect to costs. I need scarcely add, that my Lord Chief Justice concurs in opinion with my Brother *Burrough* and myself.

Rule discharged.

Saturday,
May 10th.

CONSTABLE and Another v. BRISTOW and Another.

Where, in a joint cause of action against two defendants, the sheriff was served with two different rules to bring in the bodies:—Held, that two writs of attachment should be issued against the sheriff on his non-compliance with such rules.

MR. Serjeant *Peake* applied for an attachment against

the sheriff on his non-compliance with such rules.

the sheriff of *Middlesex*, for not bringing in the bodies of the defendants.—It appeared that two rules had been served on the sheriff; the one on the 29th *April* last, and the other on the 3d instant; but there was only one cause of action, at the suit of the plaintiffs, against the two defendants jointly.

1828.
CONSTABLE
v.
BRISTOW.

The Court held, that it would be the most prudent and safe course to issue two several writs of attachment, as the sheriff had been served with two distinct rules, and at different times.

PRING, *Deforciant*.

Saturday,
May 10th.

MR. Serjeant *Taddy* moved that this fine, which had been levied in *Michaelmas* Term, 36 *Geo. 3*, might be amended by inserting the words "*St. Peter in*" before that of "*Malden*." It appeared that in the fine the premises had been described generally as being situate at *Malden*, in the county of *Essex*. He produced an affidavit, which stated that there were three parishes in that town, of which the principal one was *St. Peter's*, and in which the premises were sworn to be situate.

Where premises were described in a fine to be situate at *Malden* in the county of *Essex*, it may be amended by adding the words "*St. Peter in*" before *Malden*, there being three parishes in that town.

Fiat.

DODDINGTON v. HUDSON.

Monday,
May 12th.

THIS was an action on the case, and brought by the plaintiff, as a reversioner, against the defendant, for pulling down and damaging a dwelling house in the possession of his tenant.—The defendant pleaded the general issue.

At the trial, before the Lord Chief Baron, at the last

In an action on the case by a reversioner, for an injury done to his inheritance, the tenant in possession is a competent witness

to prove the nature and extent of the injury, as the verdict cannot be given in evidence either for or against him, and as no benefit could result to him from his own testimony; and that, although his credit might be affected, it would not destroy his competency.

1823.

DODDINGTON

v.

HYDSON.

Summer Assizes at *Guildford*, it appeared that the defendant was the owner of a house situate in *Montague Close, Southwark*, adjoining that of the plaintiff: that the defendant had built a wall, which, it was contended, was on the plaintiff's soil, and that he had destroyed his staircase. It was proved that the plaintiff's and defendant's premises were formerly occupied as one house; that there was only one staircase, and two separate entrances; and several leases were given in evidence, as describing the nature of the property, and the number of feet each party was entitled to claim.—For the plaintiff, the tenant in possession was called to prove the nature and extent of the injury done by pulling down the staircase, when it appeared that he was originally a tenant to both, as he occupied the whole of the premises; that he afterwards occupied under the defendant, but had ceased to do so at the time of the commencement of the action, but still continued to hold under the plaintiff: when his competency was objected to on the part of the defendant, on two grounds; *first*, that as he originally took under him he could not dispute his landlord's title; and, *secondly*, that as he continued in possession under the plaintiff, he was interested in the event of the suit. The Lord Chief Baron, however, allowed him to be examined, and intimated no opinion of his own, but reserved the point for the consideration of the Court; and the jury having found that the plaintiff was entitled to the land on which the defendant had made the encroachment by building his wall, they accordingly found a verdict for the plaintiff, damages one shilling, subject to the defendant's repairing and reinstating the premises.

Mr. Serjeant *Taddy*, in the last *Michaelmas* Term, having obtained a rule *nisi*, that this verdict should be set aside and a new trial granted, on the ground that the tenant in possession and holding under the plaintiff was an incompetent witness to prove the nature of the injury done

to his reversionary interest, and that his testimony had been improperly received;

1823.
DODDINGTON
v.
HUDSON.

Mr. Serjeant *Peake*, on a former day in this Term, shewed cause; and submitted that the tenant was properly admitted as a witness, to shew the extent and nature of the injury the plaintiff had sustained with respect to his reversionary interest on account of the acts done by the defendant; and as it did not affect the possession of the tenant, he had no direct interest in the result of the suit, nor could the verdict be used or given in evidence in any action either for or against him, or in any suit he might commence against the defendant for the actual injury done to his own possession as such tenant. Although in an action of ejectment the tenant in possession is an incompetent witness in support of the defendant's title under whom he holds, yet, there, he stands in a wholly different situation, as he might be liable to be turned out of possession if the verdict were found against his landlord. So he would be liable to the mesne profits; and the verdict in ejectment would be evidence against him in an action to recover them, so that he would have a direct interest in the result, according to the case of *Doe d. Foster, v. Williams* (a). In *Doe d. Jones, v. Wilde* (b), where the plaintiff had made out a *prima facie* case against the defendant, as tenant in possession, it was held that a witness called on the part of the defendant was not competent to prove himself the real tenant, and that the defendant was only his bailiff, as the verdict would have the effect of turning him out immediately; that it was therefore an immediate interest, and outweighed the remoter effect of his subjecting himself by his testimony to an action of ejectment and trespass for mesne profits. Both these cases are wholly distinguishable from the present, as they proceeded on the

(a) Cowp. 621.—(b) 5 Taunt. 183; S. C. 1 Marsh. 7.

1823.
DODDINGTON
v.
HUDSON.

principle, that the witness had a direct or immediate interest. Here, however, the record could not be used by the witness in an action against the defendant for an injury done to his own possession; and it does not follow, that although the plaintiff obtained a verdict for an injury done to his reversionary estate, that the premises would be restored to their former state; or that the witness would not be left to pursue his remedy against the defendant for the injury done to his immediate possession.

Mr. Serjeant *Taddy*, in support of the rule, insisted that the tenant must, of necessity, be benefited by the verdict; and that even if such were the probable consequence, it would be of itself sufficient to render him inadmissible as a witness. In *Upton v. Curtis* (a), where the landlord, in order to satisfy rent due from his tenant, distrained on the under tenant, and avowed as bailiff of his tenant, it was held that the tenant was not a competent witness to prove the amount of the rent to be paid by the under tenant to him, on the ground that he would be thereby relieved from payment of part of the rent distrained for. In *Owen Hanning's Case* (b), Mr. Justice *Twisden* said, "If a man promise another that if he recover his land the other shall have a lease of it, he is not a good witness." So, here, the probable consequence would be, that the tenant in possession of the premises would receive a benefit in case a verdict was found for the plaintiff, as he was, in point of fact, a privy in estate with the reversioner, and if so, he might be allowed to use the verdict found for the latter in his favour in an action against the defendant for the injury done to his individual interest. And in *Pyke v. Crouch* (c), it was held, that if several estates in remainder be limited in a deed, and one of the parties in remainder obtain a verdict in an action brought

(a) *Abts*, page 52.—(b) 1 *Mod.* 21.—(c) 1 *Ld. Raym.* 730.

against him for part of the land, that verdict may be given in evidence by another person in remainder, in an action brought against him for the same land, although he does not claim any estate under the first remainder-man. And in *Kinnersey v. Orpe* (a), it was decided that a recovery in an action of trespass, against one who justified as servant of A., is admissible, though not conclusive evidence of the right in an action, against another servant of A. for a similar trespass (b).

1823.
DODDINGTON
v.
HUDSON.

Cur. adv. vult.

Mr. Justice PARK now delivered the judgment of the Court as follows:—This was an action on the case brought against the defendant by a reversioner, for an injury done to his inheritance; and at the trial the tenant in possession was called to prove the nature of the injury, when he was objected to by the defendant as being an interested witness. But the Lord Chief Baron allowed him to be examined, reserving the point for the consideration of the Court, and the only question now is, whether his testimony was properly received. The old rules of evidence, as to the competency of witnesses, have been much narrowed, and the Courts have endeavoured, as far as possible, to limit the objection to the credit rather than the competency of the witness. This course was invariably adopted by Lord Mansfield (c). So, Lord Chief Justice Hardwicke, in the case of *The King v. Bray*, said, that (d) “whenever a question arose at *Nisi Prius* as to the competency or credit of a witness, he was always inclined to restrain it to his credit rather than his competency.” But the rule on which the Court has grounded its decision in this case, is to be found in *Bent v. Baker*, where Lord Kenyon said,

(a) 2 Doug. 517.—(b) See *Peake's Evidence*, 5th Edit. 40, 41.—
(c) See *Walton v. Shelley*, 1 Term Rep. 300.—(d) Rep. Temp. Hardw. 360; S. C. *nomine Rex v. Gray*, Selw. Ni. Pri. 3d Edit, 1044, (a).

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that (a) "Wherever there are not any positive rules of law against it, it is better to receive the evidence of the witness, making, nevertheless, such observations on the credit of the party as his situation requires. The general question put to a witness on his *voir dire* amounts to this, whether the record in the cause will affect his interest." "I must acknowledge (b), (observed his Lordship,) that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases. Then we have only to consider what are the principles and good sense to be extracted from them all. I think the principle is this, if the proceedings in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon the subject, for that only goes to his credit and not to his competency; as where he stands in the same situation with the party for whom he is called to give evidence, there is no doubt but that it may influence his testimony; or where a father is giving evidence for the son: but this does not render him incompetent, and such circumstances are always open to observation." And Mr. Justice *Buller* there said, that (c) "he took the true line to be this, is the witness to gain or lose by the event of the cause?" It must be remarked that *Bent v. Baker* was decided after great consideration, and is one of the leading cases which has established the rule of evidence on this subject. It was originally in this Court, and on a bill of exceptions having been tendered and signed, it was afterwards removed into the Court of King's Bench by a writ of error, where the opinion of Lord *Loughborough*, that the witness was not competent, was over-ruled; and although a writ of error was afterwards brought to reverse the judgment of that Court, it was subsequently abandoned. That case has since been frequently referred to and confirmed, as in

(a) 3 Term Rep. 32.—(b) *Id.* 33.—(c) *Id.* 36.

Jordaine v. Lashbrooke (a), and in *Smith v. Prager* (b), Lord *Kenyon*, in delivering his judgment, to which the other Judges assented, said, "We are now called upon to review the decision in the case of *Bent v. Baker*, which has laid down a clear and certain rule, by which I have ever since endeavoured to regulate my opinion in causes coming before me at *Nisi Prius*, though probably I may not have decided properly in every instance, when called upon to form an opinion on the sudden. The rule there laid down was, that no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest;" and his Lordship went on to observe, after citing all the cases and authorities on the subject, that the point decided in *Bent v. Baker* was, that the objection to a witness on the ground of future interest, only went to his credit, unless the judgment could be given in evidence for him in any other suit, and that the authority of that case stood fully confirmed. And in the subsequent case of *Forrester v. Pigou* (c), the above rule was not impugned, but distinctly recognised by Lord *Ellenborough*; and that case was sent down to be re-tried, for the purpose of ascertaining the time when an undertaking was made by one of the plaintiffs to one of the defendant's witnesses, who, on his examination on the *voir dire*, stated that he had paid the loss, but had since been promised by one of the plaintiffs, that he should be placed in the same situation with the other underwriters if they did not settle. If, therefore, the plaintiffs failed in their action against the then defendant, the witness was to receive back the money he had paid on account of the loss; and if so, he was directly interested in endeavouring to procure a verdict for the

1823.
DOWDINGTON
v.
HUDSON.

(a) 7 Term Rep. 604.—(b) *Id.* 62.—(c) 1 Maul. & Selw. 9.

1823.
DODDINGTON
v.
HUDSON.

defendant. Thus, then, this case stands with regard to authority as to the admissibility of the witness whose evidence was received at the trial; and we have anxiously looked to see whether he could gain or lose by the event of this suit; but we think it impossible that he could either be benefited or prejudiced by its result. The verdict cannot be given in evidence in any action either for or against him. If the plaintiff recover a verdict, the damages are entirely his own, and at his sole disposal, by way of compensation for the injury done to his reversionary interest, and he cannot be bound to lay out any part of them, or expend one farthing on the premises during the tenancy. So, if the witness should bring an action for the injury done to his possession, the plaintiff's verdict could not in any way, either directly or indirectly, be used or made available for him. The witness might have strong wishes on the subject, and his mind might have been biassed or influenced, but that circumstance existed in all the other cases. The situation in which he was placed might subject him to the observation of the jury as to his credit, but had not the effect of destroying his competency, or disqualifying him altogether. If two actions are brought against two persons for the same assault, the defendant in one action may be a witness for the defendant in the other (a); and as he stands in the same situation as the party for whom he is called to give evidence, he must certainly be under as strong a bias as the witness whose evidence was admitted at the trial: and there appears to be no case where such a witness has been rejected, although the point must frequently have arisen before. In *Doe d. Foster, v. Williams*, the tenant in possession on whom an ejectment had been served was deemed an incompetent witness to support his landlord's title, because it was to uphold his own possession. So, in *Pyke v. Crouch*, it was held

(a) 1 Term Rep. 301.

that a party cannot be a witness for another, where they both claimed under the same deed. Neither of those cases, therefore, appear to have any bearing on this particular point. The Court have reason to believe that witnesses similarly circumstanced have been constantly admitted; and we have been informed that in a late case on the Northern Circuit such an objection was taken and over-ruled, and no application was afterwards made to set aside that decision. But, in the absence of any authority, and admitting this to be a new point; by deciding that the testimony of the witness was properly received at the trial, we shall violate no rule of law; but on the contrary, support the general principle, that, where the verdict cannot be given in evidence for or against the witness, and where he can derive no benefit from the testimony he gives, whatever his wishes may be, he is admissible as a witness, and this rule must consequently be

Discharged.

MAVOR, Assignee of PYNE, a Bankrupt, v. CROOME.

Monday,
May 12th.

THIS was an action for money had and received, and brought by the plaintiff, as the assignee of *Pyne*, a bankrupt, to recover from the defendant the sum of £71. 10s. paid to him under the following circumstances, which were established in evidence at the trial before Lord Chief Justice Dallas at Guildhall, at the Sittings after the last Michaelmas Term. *Pyne*, the bankrupt, held and occupied a house in *Maryle-Bonne*, under a lease from the defendant, at the yearly rent of 70*l.*, payable quarterly; and in September, 1818, he was arrested on mesne process, and committed to the Fleet Prison, where he continued in custody within the

Where a trader, being possessed of a beneficial lease, proposed, after an act of bankruptcy, to dispose of it to a purchaser, who refused to take it, unless the premises should be first discharged from all arrears of rent which were then due to the landlord, and the rent was af-

terwards paid to the latter out of the money which the purchaser had agreed to give for the lease, the landlord being aware of the situation of the bankrupt, and there being no property to distrain on the premises at the time, but the landlord having a right of re-entry, according to a proviso in the lease: Held, that the assignee of the bankrupt could not recover from the landlord the rent so paid to him, in an action for money had and received, as the estate of the bankrupt had been benefited by such payment, and as the landlord had thereby waived his right to distrain, as well as to proceed by ejectment, for a breach of the proviso contained in the lease.

1823.
MAJOR
V.
CROOME.

rules until *November*, 1819. The lease of the premises having been previously deposited with one *Morland*, as a security by way of mortgage, for a debt owing to him by the bankrupt, and more than a year's rent being then due to the defendant, and no goods on the premises on which he could distrain, they having been removed by the bankrupt previously to his going to prison; the latter proposed to sell the remainder of his term, and dispose of the lease to Mr. *Thompson* for 220*l.*, who refused to purchase it, unless the premises should be discharged from all rent which should be due to the defendant at *Christmas*, 1819, when five quarters would be in arrear, and which amounted to 87*l.* 10*s.*, for the recovery of which this action was brought. The bankrupt then made the defendant acquainted with the circumstances and offer of *Thompson*, and it was ultimately agreed between them that the five quarters' rent, which would become due to the defendant at *Christmas*, should be paid to him out of the 220*l.* which *Thompson* had agreed to give for the lease, and that the sum due to *Morland* should be also satisfied. In pursuance of this arrangement, an assignment of the lease was made by the bankrupt to *Thompson* in *November*, 1819, when *Morland* gave up the lease to him on being paid the sum due to him from the bankrupt; and the residue of the purchase-money was then paid over to the latter, who immediately paid the defendant the arrears of rent which would become due to him at *Christmas* following. The lease contained a clause of re entry, if the rent should be behind and unpaid by the space of twenty-one days next after either of the days appointed for payment, or on breach of any of the covenants by the bankrupt or his assigns, therein contained. On the 31st *January*, 1822, a commission was issued against *Pyne*, founded on the act of bankruptcy committed by his lying in prison from *September*, 1818, to *November*, 1819, and under which the plaintiff as his assignee claimed to be entitled to the sum in question, as having been paid to the de-

fendant by the bankrupt after he had committed an act of bankruptcy.

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MAYOR
v.
CROOKS.

For the defendant, it was insisted, that as the payment of the arrears of rent due to him from the bankrupt was made in lieu of a distress, it did not fall within the provisions of the bankrupt laws; and his Lordship being of that opinion, the jury, under his direction, found a verdict for the defendant, reserving to the plaintiff leave to move to set it aside and have a verdict entered for him for 87*l.* 10*s.* if the Court should be of opinion that he was entitled to recover.

Mr. Serjeant *Taddy*, in the last Term, accordingly obtained a rule *nisi*; and submitted that as the defendant knew of the bankruptcy of *Pyne* at the time the payment was made to him on account of the rent, he was bound to refund it to the plaintiff, as his assignee, as it was not protected by the statute 19 *Geo.* 2, which only extended to payments made on bills of exchange, or for goods sold. Although in *Stevenson v. Wood* (a), it was held, that money paid for rent to a landlord who was about to distrain, by a trader, after an act of bankruptcy committed, was not recoverable back by the assignees; yet, there, the bankrupt's goods remained on the premises, and were consequently subject to the distress; whilst here, there was nothing on which a distress could be levied, the bankrupt having sold all his effects before he went to prison. Although the defendant at one time might have re-entered, according to the clause in the lease for non-payment of rent, yet he allowed five quarters to be in arrear, by which he had waived any remedy he might have obtained under that clause. In *Ex parte Deschurmes* (b), it was held, that if the goods of a bankrupt are sold by the assignees, and taken off the premises, the landlord loses his remedy by distress,

(a) 5 *Esp. Ni. Pri. Cas.* 200.—(b) 1 *Atk.* 103.

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MAVOR
v.
CROOME.

creditor under the commission. No forfeiture has been incurred, as the proviso in the lease does not amount to a *cesser* of the bankrupt's term, but was merely a common clause, providing for re-entry in case of non-payment of rent; and the defendant could not avail himself of it, unless he had made a demand of payment on the last of the days it became due, and complied with the necessary and technical formalities; and not having done so, the defendant, in point of fact, had no right of re-entry at the time of the assignment of the lease, or receipt of the sum in question; as he then stood in the ordinary situation of a landlord, having merely a power to distrain, or as an ordinary creditor, receiving money with a full knowledge that the party paying it had previously committed an act of bankruptcy.—

[*Mr. Justice Park.*—In *Doe d. Scholefield, v. Alexander (a)*, where the lease contained a proviso, that if the rent should be in arrear twenty-one days next after any of the days of payment, (*being lawfully demanded*), the lessor might re-enter; and five quarters being in arrear, and no sufficient distress on the premises, it was held that the lessor might re-enter without a demand.]

That case was decided on the construction of the statute 4 Geo. 2, c. 28; but here, the formalities attending a demand of rent at common law should have been observed; and the defendant should not have allowed five quarters to be in arrear at the time of the assignment of the lease to the purchaser. When the assignment took place, the defendant lost any remedy he might have as landlord of the premises, either by proceeding by ejectment or by distress; and from that moment the property vested in the plaintiff, as the assignee of the bankrupt, for the benefit of his creditors: and although the defendant might have

taken either of those steps before the assignment was made, yet, as he had not done so, he had thereby waived his right, and the plaintiff was not bound by any transaction that took place between him and the bankrupt. The case of *Stevenson v. Wood* is altogether distinguishable from the present; as there the goods of the bankrupt remained on the premises, and might have been distrained at the time the payment was made. Besides, that was a mere *Nisi Prius* decision; and here, as there were no goods on the premises, the defendant abandoned nothing from which he could have derived any advantage; and as he could not stand in a better situation than the general creditors, and had not even contemplated a distress at the time the payment was made to him, he cannot retain it as against the plaintiff, who has derived no benefit from it, besides which, it was made without his privity or assent.

1823.
MAYOR
v.
CROOME.

The Court intimated a strong inclination in favour of the defendant, on the principle laid down in *Stevenson v. Wood*, but expressed a doubt as to whether he could enforce the payment of rent due to him from the bankrupt from a subsequent tenant, or distrain on the goods of the latter for the same; but they observed that in justice the verdict ought, if possible, to be supported.

Cur. adv. vult.

Mr. Justice PARK now delivered the judgment of the Court as follows:—When this question was argued on *Saturday*, we thought it embraced a case of great hardship on the defendant, and that we might, in the hurry of the moment, overlook the law and justice of the case; but we have since considered it, and are of opinion that the rule must be discharged. The case is peculiar in all its circumstances, which were these:—A party went to prison, and became a bankrupt by lying there more than two months. Before, and at the time of his imprisonment, he

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v.
CHOOMER.

was entitled to a beneficial lease in a house, which was mortgaged to a person by the name of *Morland*. The bankrupt afterwards had an opportunity of disposing of this lease beneficially; but five quarters' rent being in arrear to the landlord, the proposed purchaser refused to take the lease, unless the rent was first paid. The bankrupt in consequence sent for his landlord, who agreed to allow him to obtain 220*l.* for the lease, on his paying off the money due to the mortgagee, who had a lien on it, and who held it by way of security; and satisfying the rent due to him as landlord. This sum was received by the bankrupt more than two years before the commission was issued against him, and out of which he paid off the mortgage, and satisfied the five quarters' rent due to the defendant as his landlord, and which is now sought to be recovered from him by the plaintiff, as assignee of the bankrupt, as for money had and received by the defendant to his use, after he had committed an act of bankruptcy: and it has been contended, that as there were no goods on the premises of the bankrupt, which the defendant, as his landlord, could distrain, and as he knew the situation of the bankrupt, and the circumstance of his having lain more than a year in prison at the time he received the five quarters' rent so due to him, he cannot retain it as against the plaintiff as his assignee. This cannot be considered to fall within the provisions of the statute 19 *Geo. 2.*, or to be deemed a payment within that statute: but the case of *Stevenson v. Wood* was relied on for the defendant, and on the principle of which the Court now proceeds in forming its judgment. That was an action for money had and received, and brought to recover back a sum which had been paid to a landlord, who was about to distrain for rent, after his tenant had committed a secret act of bankruptcy. There, it appears that the goods were left on the premises; and the ground of law taken by the then Solicitor General, for the defendant's right to hold the money independently of

the statute 19 Geo. 2, or any protection to be derived from it was, that, under the bankrupt laws, the landlord had a right to distrain for rent in arrear, and that the goods of the bankrupt were subject to the distress, notwithstanding the act of bankruptcy. That the assignees took the goods, subject to the prior title of the landlord, to whom they were bound to pay his rent, before they could remove the goods, otherwise the landlord had a right to distrain off the premises; that having that right, he had a power to waive it, and to accept the rent, in lieu of his right to distrain: and Lord *Ellenborough* assented to the law as so laid down, and said, that "the landlord has by law a right of distress; he has a legal lien on the bankrupt's goods, unconnected with the bankruptcy; if he thinks fit to waive that right, and accept of the rent, he should not be placed in a worse situation than if he had made an actual distress; it would be a fraud on his legal rights to hold otherwise." Here, although there were no goods on the premises, yet the landlord had a right of re-entry by the terms of the lease, and might have recovered in ejectment if the rent remained unpaid twenty-one days next after either of the days appointed for its payment. He has waived that right by accepting the sum paid him in compensation of the rent due to him from the bankrupt; and his right of distress would have continued, although there were no goods on the premises on which he could distrain at the time. The sum so received by him was consequently an equivalent for the waiver of distress or bringing an action of ejectment. Besides, the assignee has received an essential benefit from the transaction, as the bankrupt's estate was subject to the payment of the five quarters' rent which was due before the commission was issued, as well as paying off the sum due to the mortgagee, with whom the lease was deposited by way of security; both of which are now discharged, but which would have remained as debts proveable under the commission unless the defendant had ac-

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ceded to the arrangement. As well, therefore, on the ground that the bankrupt's estate has derived every possible benefit from the payment in question, as that manifest justice has been done, we are of opinion that there is no substantial ground to disturb this verdict. The cases of *Ex parte Descharmes*, and *Ex parte Plummer*, do not appear to touch the question; and it need only be added that my Lord Chief Justice (a) concurs in thinking that this rule must be

Discharged.

(a) His Lordship was absent, being confined by indisposition.

Monday,
 May 12th.

FROST v. BENGOUGH.

Where, to an action on a promissory note, the defendant pleaded the statute of limitations, and the plaintiff gave in evidence a letter written by the defendant to him, stating, that "business called him to L., but should he be fortunate in his adventures, the plaintiff might depend on seeing him at B. (the place of the plaintiff's residence), otherwise, that he

THIS was an action of *assumpsit* on a promissory note, dated 15th May, 1815, payable two months after date, and drawn by the defendant in favour of one *Thomas Kay*, and by him indorsed to the plaintiff.—The defendant pleaded, *first*, the general issue; and, *secondly*, *non assumpsit infra sex annos*; on which issue was joined. At the trial of the cause, before Lord Chief Justice *Dallas*, at the Sittings at *Guildhall*, after the last *Michaelmas* Term, the plaintiff gave in evidence the following letter, written by the defendant, and addressed to the plaintiff at *Bristol*, as proof of a subsequent acknowledgment by the defendant, to take the case out of the statute.

"Sir,—Business calls me on the sudden to *Liverpool*. Should I be fortunate in my adventures, you may depend on seeing me in *Bristol* in less than three weeks; otherwise, that he must arrange matters with him as circumstances would permit;" and it was not shewn that the letter referred to any other transaction between the parties:—Held, that it was properly left to the jury to determine whether it related to the note, so as to amount to a sufficient acknowledgment to take the case out of the statute; and they having found in the affirmative, held that their verdict was conclusive.

wise, I must arrange matters with you as circumstances will permit. I shall leave town to-morrow night.

Henry Bengough.

London, 24th September, 1817."

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For the defendant, it was insisted that the plaintiff ought to be nonsuited, although the letter might be construed to contain a promise or acknowledgment, as it had no reference to the note in question.—His Lordship, considering the letter to be ambiguous in terms, left it to the jury to say, whether it referred to the note, and they, in absence of evidence to the contrary, found that it did, and accordingly gave a verdict for the plaintiff, and stated that they founded their verdict on the letter alone and unconnected with any other fact. Leave, however, was given the defendant to move to set it aside, in case the Court should be of opinion that the plaintiff was not entitled to recover.

Mr. Serjeant *Vaughan*, in the course of the last Term, accordingly obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, on the grounds, that the letter itself was not a sufficient acknowledgment of an existing debt to take the case out of the statute, and that it had no reference to the note, nor was there any evidence to connect it with that instrument. That it, therefore, ought not to have been left to the jury to put a construction on it; and as the plaintiff had not proved the contents of any letter written by him to the defendant requiring payment of the note, the verdict could not be supported. He relied on the cases of *Hellings v. Shaw* (a), *Roucroft v. Lomas* (b), and *Beale v. Nind* (c), to shew that there must be evidence of an acknowledgment of an existing demand, or that the debt still remains unpaid.

(a) *Ante*, Vol. I. 340.—(b) 4 Mau. & Selw. 457.—(c) 4 Barn. & Ald. 568.

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Mr. Serjeant *Taddy* now shewed cause. The only question is, whether the letter produced by the plaintiff at the trial applied to his demand on the note given by the defendant; and as there was no evidence of any other dealing or transaction between them, the jury were fully warranted in concluding that it did. It was a question of fact purely for their consideration; and it was most properly left to them to say whether it applied to the note in question or not: and if it did, there can be no doubt but that it contained a sufficient acknowledgment to take the case out of the statute. In *Lloyd v. Maund* (a) it was held, that a letter written by the defendant, (who pleaded the statute,) couched in ambiguous terms, should be left to the jury to consider whether it amounted to an acknowledgment of the debt or not. That case is precisely in point, and consequently there can be no ground to disturb the verdict of the jury.

Mr. Serjeant *Vaughan*, in support of the rule. It was incumbent on the plaintiff to have shewn that there were no other dealings between him and the defendant to which the letter of the latter could refer; for, in *Beale v. Nind*, Mr. Justice *Bayley* expressly laid down that (b) “the *onus* of taking a case out of the statute of limitations is upon the plaintiff.” Here, however, the letter contained no acknowledgment of any existing debt, nor does it even refer to any pecuniary transactions, but merely an arrangement of matters between the parties; and when it is considered, that the note was given in *May*, 1815, and the letter was not written for more than two years after it became due, it would in all probability have reference to subsequent dealings between the parties. This case is altogether distinguishable from that of *Lloyd v. Muund*; as, there, the debt was neither expressly admitted nor denied; and Mr. Justice *Ashhurst*

(a) 2 Term Rep. 760.—(b) 4 Barn. & Ald. 571.—(c) 2 Term Rep. 762.

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said, that "though the letter was written in ambiguous terms, there were some parts of it, from which the jury might perhaps have inferred an acknowledgment of the debt." There, too, the defendant said in substance, that rather than pay the costs he would go to gaol; by which it might be taken that something was due. That, therefore, ought to have been left to the jury; and here, although they found that the letter related to the note only, its construction belonged exclusively to the Court; and if so, it was not sufficient in terms to amount to an acknowledgment, according to the principles laid down by Lord Chief Justice Gibbs, in the late case of *Hellings v. Shaw*, where he said, that (a) "it was probable that if the Courts could retrace the steps they had taken, they would perceive that justice would have been better consulted by a strict adherence to the statute, without consulting the particular cases of individuals." And in *Roweroft v. Lomas*, Lord Ellenborough said (b), "Something more must be proved than a bare acknowledgment by the defendant that the thing is unsatisfied, to give effect to that which is *per se* destroyed. The cases, indeed, have determined, that a debt, the existence of which is extinct through lapse of time, may be revived by an acknowledgment that it is unsatisfied. But there must first be some acknowledgment that it ever existed."—Here, the term "adventures" cannot be taken in any sense to refer to the note, and the arrangement of matters with the plaintiff must be taken to apply to commercial matters; and if so, it contains no acknowledgment of any existing debt: and it was for his Lordship, who tried the cause, to have put a legal construction on it, and not left it to the consideration of the jury.

Mr. Justice PARK (c).—I am of opinion that this verdict ought not to be disturbed. Within our recollection,

(a) *Ante*, Vol. I. 343.—(b) 4 Maul. & Selw. 458.—(c) Lord Chief Justice Dallas was absent.

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the statute of limitations has been too much frittered away. In *Bryan v. Horseman* (a), a mere acknowledgment of the debt, although accompanied with a declaration by the defendant, "that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted," was held sufficient to take the case out of the statute; and Lord *Ellenborough* there said, that (b) "the Court had looked into all the authorities; and that whatever their opinion upon the statute might have been, had the question been new, yet that, after the long train of decisions upon the subject, it was necessary to abide by the construction which had been put upon it." There, however, the defendant acknowledged in the same breath that he had had the wheat, and that he had paid for some part of it, but admitted that 26 $\frac{1}{2}$ remained due; and it was held to be a sufficient acknowledgment of the pre-existing debt to create an *assumpsit*, so as to take the case out of the statute, although the defendant denied at the time of the arrest that he then owed any thing, it being more than six years since he contracted. In this Court, however, there have been several recent cases, where the evidence as to the acknowledgment of the debt has been extremely slight, in which it has been held, that such acknowledgment is not to be left to the jury, as evidence of an admission, to take a debt out of the statute, or to raise an inference of a new promise to pay. In *Coltman v. Marsh* (c) where the defendant said to the plaintiff, "I owe you not a farthing, for it is more than six years since," it was held that it ought not to have been left to the jury as evidence of an admission to take a debt out of the statute, as the defendant meant to stand expressly on it. And in the subsequent case of *Hellings v. Shaw*, which was an action on an attorney's bill, in which he sought to recover his charges relative to the grant of an annuity, the defendant said, that

(a) 4 East, 599.—(b) *Id.* 603.—(c) 3 Taunt. 380.

"he thought it had been settled at the time the annuity was granted, but that he had been in so much trouble since, that he could not recollect any thing about it," was not a sufficient acknowledgment of the debt to take it out of the statute, and was not to be left to the jury as evidence of the admission of such debt. So, in *Craig v. Cox* (a), where the defendant, on being applied to by the plaintiff's attorney for the payment of a debt, wrote him that he would wait on the plaintiff, when he should be able to satisfy him respecting the misunderstanding which had occurred between them, it was held that such evidence ought not to be left to a jury as a ground to infer a new promise to pay.—The decision here, however, will not militate against those cases, nor is it necessary to combat the principles on which they were decided. It is perfectly clear that, in general, the plaintiff is bound to make out a *prima facie* case, and adduce evidence of an acknowledgment by the defendant, to take a case out of the statute. Here, he produced a promissory note, which was proved to be in the handwriting of the defendant, as well as a letter written by him, which, although couched in ambiguous terms, was sufficient to shift the *onus* on the defendant, and render it incumbent on him to shew that it related to other matters than the note in question; and more particularly so, when it is considered, that the defendant, by pleading the statute, has virtually admitted that a debt was originally due. The case of *Beale v. Nind* does not appear to be in favour of the defendant. There, the substance of the conversation between the parties was, that although there was once a debt, yet that it had been discharged by the deceased partner of the plaintiff having paid himself out of money in his hands belonging to the defendant; and Lord Chief Justice *Abbott* said, that (b) he was by no means satisfied, upon proof of the conversa-

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(a) Holt. N. P. C. 380.—(b) 4 Barn. & Ald. 570.

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tion held with the defendant, that it was competent to the plaintiff to go into the whole of the accounts between his deceased partner and the defendant, to falsify what the latter said. Admitting, however, that that could be done, it was not made out to his Lordship's satisfaction that the defendant's assertion that this matter had been settled between such deceased partner and him was untrue; he could not, therefore, say that the jury had come to a wrong conclusion." There, it was left to the jury to consider, whether there was only one account to which the defendant's conversation could refer. So, here, it was properly left to the jury to say, whether the letter referred to the promissory note given by the defendant, or not. The case of *Lloyd v. Maund* was not determined as to the nature of the acknowledgment, but whether, as the letter containing it was ambiguous in terms, it ought not to have been left to the jury; and that Lord *Kenyon*, who tried the cause, and nonsuited the plaintiff, ought not to have put a construction on it as in the case of a deed: and his Lordship, having tried the cause, declined giving any opinion when it was afterwards brought before the Court; but Mr. Justice *Ashurst* said, that (a) "the only doubt on his mind was, whether the letter should not have been left to the jury, for them to form an opinion upon it; and that though it was written in ambiguous terms, there were some parts of it from which the jury might perhaps have inferred an acknowledgment of the debt, and that he thought the jury should have put their construction on it: and Mr. Justice *Buller* concurred in thinking that it should have been left to the jury. That case appears to be precisely in point to shew that the letter in this case, being clothed in ambiguous terms, was most properly left to the jury to decide whether it related to the plaintiff's demand or not. It is not necessary for the Court to determine whether they have drawn a right conclusion; but speaking for myself,

(a) 2 Term Rep. 762.

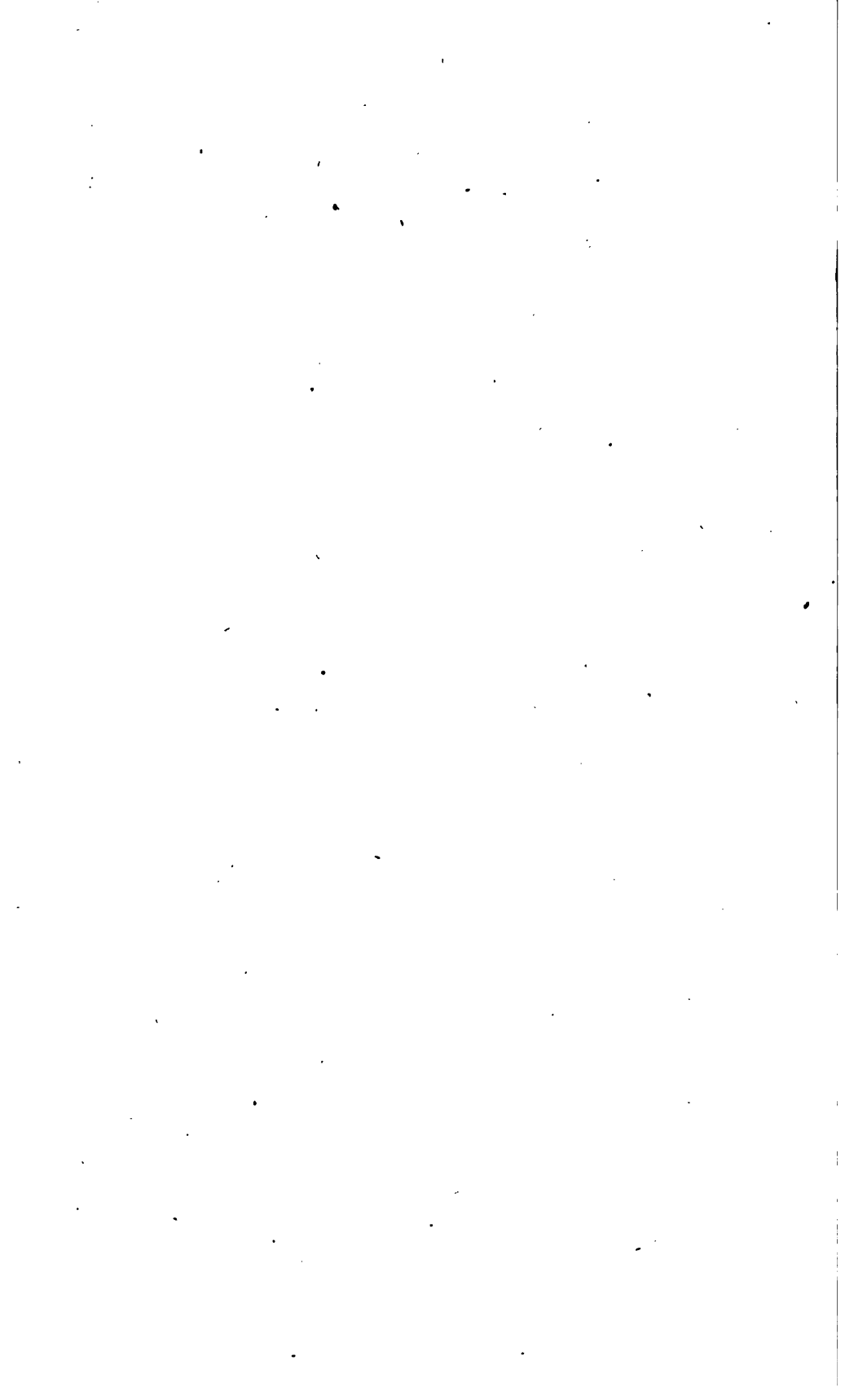
I am strongly inclined to think that I should have found as they did, and consequently that there is no ground to disturb their verdict.

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Mr. Justice BURROUGH. — Wherever the statute of limitations is pleaded as a defence to the action, the party pleading it virtually admits that a debt was originally due; and here the defendant's letter can relate to nothing, unless it be taken to refer to a pre-existing demand. The defendant, in *London*, having been connected with the plaintiff, who resided at *Bristol*, wrote him that "business called him on a sudden to *Liverpool*; that if he should be fortunate in his adventures he might depend on seeing him in *Bristol* in less than three weeks." These adventures must be taken to relate to money matters, and that if the defendant were fortunate he would bring down the fruits of his adventures to the plaintiff; if not, that he must arrange matters with him as circumstances would permit, or in other words make the best terms with him he could. Did, then, the jury do right or wrong in referring this letter to an existing demand? I am of opinion that they came to a right conclusion, and that they could not refer it to any thing besides the note, as there appeared to be no other demand to which it could apply. If there had been, the defendant might have shewn it. I fully concur with my Brother *Park* that the question was most properly left to the jury, and, for the above reasons, am quite satisfied that they have come to a right conclusion.

Rule discharged.

END OF EASTER TERM.



CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN TRINITY TERM,

IN THE FOURTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDUM.

THE continued indisposition of Mr. Justice *Richardson* prevented his attendance in Court during any part of this Term.

GREGORY v. HURRILL (a).

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THE following case was sent by the direction of the Lord Chancellor for the opinion of the Judges of this Court:—

Where one of two partners being abroad, writs of *capias*,

alias, and *pluries*, returnable in *Michaelmas* Term, 1812, and *Hilary* Term, 1813, were sued out against both, with a view to outlawry against the former; but a commission of bankruptcy having been sued out against the other partner resident in this country, the proceedings as to the outlawry were suspended; and the absent partner never returned to this country until 1819, except by touching at *Deal* in 1814, for a mere temporary purpose, on his passage from one foreign port to another; and in 1821 a fresh action was commenced against him in *K. B.* for the same debt; but as he avoided an arrest, a commission of bankruptcy was issued against him in that year, and he afterwards commenced an action in this Court to try the validity of the commission; and previously to the trial, but after the commission, continuances were entered up on the former writs issued in 1812 and 1813, and regularly brought down to the term before the latter trial.—Held, that the debt on which the commission was founded, was not barred by the statute of limitations, but that at the time of issuing the said commission, it was a good pe-tioning creditor's debt: And it seems, that the touching at *Deal*, was not a return to this country from beyond seas, within the meaning of the statute 21 Jac. 1, c. 18, ss. 3, 7.

(a) See *ante*, vol. 6, 525.

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In the year 1811, one *Rupert Leigh Hipkins*, (since deceased) and *George Barnard Gregory*, the present plaintiff, having entered into a commercial speculation, or adventure, in a cargo of goods, a partnership agreement was drawn up and signed by both parties.

On the occasion of entering into the agreement, *R. L. Hipkins* and his wife transferred 3000*l.* bank annuities, into the name of *Benjamin Walsh*, a broker, to answer the purposes of the speculation, who thereupon agreed to become the agent of the concern, upon the usual terms of interest, and a commission of 2*½ per cent.* being allowed upon the amount of all advances and payments made by him in the course of such agency. The proceeds of the cargo were to be remitted to *Walsh* for the payment of such advances. Various goods were purchased, and the different merchants and tradesmen were referred to *Walsh*, who either paid in cash, or accepted bills of exchange for the amount.

The goods were shipped on board the ship *Irvine*, bound to *Algiers*, and *G. B. Gregory*, (the plaintiff), soon afterwards sailed with the cargo for *Algiers* in that ship.

Walsh continued to pay the bills so accepted by him, on account of the goods shipped on board the *Irvine*, down to the month of *December*, 1811, when he became bankrupt, at which time there was a balance exceeding 1000*l.* due from *Gregory* and *Hipkins* to *Walsh*, which balance has not since been reduced.

On the 24th *June*, 1812, while *Gregory* was abroad, *John Thomas Taylor* and *John Parker*, as assignees of *Walsh*, commenced an action by special original, in the Court of *King's Bench*, against *Hipkins* and *Gregory*, for the recovery of a debt then claimed to be due and owing from *Hipkins* and *Gregory* to the estate of *Walsh*, and for that purpose sued out a writ of special *capias*, directed to the sheriffs of *London*, returnable on the Morrow of *All*

Souls in *Michaelmas* Term, 1812, and indorsed for bail for the sum of 1000*l.* and upwards.

Hipkins being, at the time of suing out the said writ, a prisoner in the *King's Bench* prison, was detained in custody at the suit of the assignees of *Walsh* for the above debt of 1000*l.*, and a commission of bankrupt was, on or about the 18th *August*, 1812, upon the petition of the said *J. T. Taylor* and his then co-partner, *John Taylor*, awarded and issued against *Hipkins*, as the co-partner in trade of *Gregory*, upon which commission he was duly adjudged a bankrupt.

At a meeting under the commission, held at *Guildhall, London*, on the 5th *September*, 1812, *J. T. Taylor* was duly chosen sole assignee of the estate and effects of *Hipkins*, and an assignment of such estate and effects was executed to *J. T. Taylor*, by the major part of the commissioners named in the commission.

Hipkins died in *September*, 1813. In *November*, 1812, *Gregory* being then abroad, an *alias* writ of special *capias* was sued out against him and *Hipkins*, at the suit of the assignees of *Walsh*, directed to the sheriffs of *London*, returnable in fifteen days of *St. Martin*, in *Michaelmas* Term, 1812, and on the 11th of the following *December*, a *pluries* writ of special *capias* was sued out by the assignees of *Walsh*, against *Hipkins* and *Gregory*, also directed to the sheriffs of *London*, and returnable in eight days of *St. Hilary*, in *Hilary* Term, 1813, and both the last mentioned writs were also indorsed for bail for 1000*l.* All the said writs of *capias*, *alias*, and *pluries* were lodged at the Secondary's or Sheriff's-office for *London*, between the beginning of *Michaelmas* Term, 1812, and the end of *Hilary* Term, 1813, and were severally and duly returned *non inventi* by the then sheriffs before the end of *Hilary* Term, 1813.

The action was so commenced by special original in the Court of *King's Bench*, and such several writs of *capias*, *alias*, and *pluries* were sued out therein, with a view to

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outlaw *Gregory*; but no outlawry ever took place, the completion of such intended outlawry being subsequently suspended by reason of the commission having been awarded and issued against *Hipkins*, as before stated.

At the trial of the action hereafter mentioned, in *Trinity Term*, 1821, such evidence of the return of *Gregory* to this country in *April*, 1814, was given, as is hereinafter mentioned; and he afterwards returned to *England* in *July*, 1819.

The assignees of *Walsh*, on the 15th *February*, 1821, commenced a new action in the Court of *King's Bench*, against *Gregory*, as the surviving partner of *Hipkins*, and sued out a bill of *Middlesex* against him, returnable on *Wednesday* next after fifteen days of *Easter*, in *Easter Term*, 1821; which bill of *Middlesex* was indorsed for bail for 1336*l.* 6*s.* 10*d.*, being the same identical debt, with an accumulation of interest thereon, as that for which the former action was brought against *Hipkins* and *Gregory* jointly. A warrant on the said bill of *Middlesex* was made out and delivered to an officer of the sheriff of *Middlesex*, for the purpose of executing the same, and such officer went with it to the house or residence of *Gregory*, in order to arrest him, and made several attempts to effect it; which having failed, the assigness of *Walsh*, (the plaintiffs in that action,) on the 17th *March*, 1821, proceeded to strike a docket, and on the 23rd of that month issued a commission of bankruptcy against *Gregory*; and he was thereupon adjudged and declared a bankrupt. *Aaron Hurrill*, (the present defendant), was duly chosen sole assignee of the estate and effects of *Gregory*, at the second meeting of the commissioners, held at *Guildhall*, on the 21st *April*, 1821. *Gregory* having opposed the commission, on the 12th *April*, preferred his petition to the Lord Chancellor, thereby praying that the same might be superseded; and by an order of his Honour the Vice Chancellor, made on hearing the petition, on the 9th *May*, 1821, it was ordered that *Gregory* should be at liberty to bring and prosecute an action of trover against the assignee of his estate and ef-

fects, who, on the trial, was to admit possession of goods of the value of 5*l.* in order to sustain the action; and the petitioning creditors under the commission were to defend the action in the name of the assignee, upon their indemnifying the latter; and the action was to be tried in the Court of *Common Pleas* in *London*; and it was ordered that all proceedings under the commission should be stayed until further order.

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Gregory, in pursuance of, and in obedience to the order did, on the 17th *May*, 1821, commence an action of trover against *Hurrill*, his assignee, in the Court of *Common Pleas*.—On the 19th *May*, 1821, two days after the commencement of the action of trover to try the validity of the commission, the attornies for the petitioning creditors under the commission issued against *Gregory*, fetched away from the Secondary's or Sheriff's-office for *London*, the three several writs of *alias*, *capias*, and *pluries*, sued out against *Hipkins* and *Gregory* in 1812 and 1813, with the returns indorsed on the said three writs, and gave the following receipt: "*Taylor* and another *v. Hipkins*.—Received the *capias*, *alias*, and *pluries* writs in this cause, 19th *May*, 1821. *Thomas Binns*, for *Stevenson* and *Bicknell*, *Lincoln's Inn*." These three writs were all filed together in the record office of the Court of *King's Bench*, on the 11th *July*, 1821, being the last day of *Trinity* Term in that year; and a roll of the proceedings, with continuances on the writ of *pluries*, brought down to the term next preceding the date of the commission issued against *Gregory*, was docketed and carried in on the same day the three writs were filed of record, which, in point of fact, was the day next before the day appointed for the trial of the action of trover, and only two days before such trial actually took place.—The action of trover came on for trial before Lord Chief Justice *Dallas* and a special jury, at *Guildhall*, on the 13th *July*, 1821, when *J. T. Taylor* and *Parker*, as petitioning creditors, proved the trading and act of bankruptcy of *Gregory*, and they also established by the production of certain documents,

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and the testimony of *Walsh*, that a debt of 1477l. 11s. 6d. was due to them as assignees, for and on account of the several advances made by *Walsh*: whereupon *Gregory* produced as a witness, one *Samuel Hatch*, the clerk of *Mr. Iggulden*, the Vice-consul of *Sweden*, resident at *Deal*, who identified *Gregory* as being a person, who, in *April*, 1814, had called at the office of the Vice-consul at *Deal*, several times, whilst waiting for a passage in the ship *Hazard*, (which came into the *Downs* from *St. Ubes*, bound to *Dort* in *Holland*), that he left a letter with the witness to be delivered to the captain of a ship called the *Aurora*, and that *Gregory* waited at *Deal* several days. The letter was given in evidence at the trial, and was as follows:

“Capt. *M. F. Bohl*. “*Downs*, 21st *April*, 1814.

“You will proceed from hence with all dispatch, for the port of *Amsterdam*, with your cargo, waiting for further orders in regard of the same.

“Your obedient servant,
G. B. Gregory.”

“*P. S.* As all privateers are called in, there is no occasion for convoy.”

Addressed—Captain *M. F. Bohl*, *Swedish* schooner, *Aurora*, care of *E. Iggulden Esq.* *Deal*; expected in the *Downs* hourly from *Portsmouth*.

The testimony of *Hatch* was the only evidence offered by *Gregory* of his having been in *England* from the year 1811 till the year 1819, whereupon *J. T. Taylor* and *Parker*, the assignees of *Walsh*, produced one *Martha Salter* as a witness, who stated that she knew *Gregory* in *Sweden*, in 1815, and that she had seen him in *England* at the house of *Mr. Patrick* in 1819, when he said that he had sailed from *England* in 1811, and returned in 1819, and that she had also heard him say, in the presence of his sisters, that he had never been in *England* during the whole

seven years, and that she thought she had heard him say so more than once; the assignees of *Walsh* also put in evidence, examined office copies of the aforesaid writs of *capias*, *alias*, and *pluries*, and returns indorsed thereon, and also an examined office copy of the roll of the proceedings, with the continuances entered thereon as aforesaid. The Lord Chief Justice thereupon directed the jury to find a verdict for the plaintiff *Gregory*, reserving the point for the consideration of the Court as to the effect of the continuances so as aforesaid entered on the roll, and whether the same were sufficient to take the case out of the statute of limitations?

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HUMBLE.

Within the four first days of the ensuing *Michaelmas* Term, 1821, a rule *nisi* was obtained in the Court of *Common Pleas*, on behalf of the assignees of *Walsh*, that a nonsuit might be entered, or a verdict for the defendant, upon the following grounds, viz. that the account between *Walsh*, and *Hipkins* and *Gregory* came within the exception contained in the third section of the statute 21 *Jac.* 1, c. 16; that the return of *Gregory* to this country, in 1814, for the period and under the circumstances before stated, was not such a return to *England* within the meaning of the statute of limitations, as that the six years thereupon began to run against the said debt; and that the suing out the aforesaid writs of *capias*, *alias*, and *pluries*, with the returns thereon, and the subsequent continuances took the debt out of the statute. After the granting of such rule, *Gregory*, in the same term, obtained a rule *nisi* in the Court of *King's Bench*, to set aside the return of the writ of special *capias*, and the subsequent proceedings thereon, for irregularity, with costs; and when the same came on for argument, the Court referred it to the Master to determine whether such proceedings had been regular, according to the practice of that Court; and the Master afterwards reported, that, according to the practice of the Court of *King's Bench*, established for many years, the proceedings had been regular, and were suffi-

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cient to save the statute of limitations, whereupon the rule nisi obtained by *Gregory* was discharged with costs.—In *Hilary* Term, 1822, the rule nisi obtained by *J. T. Taylor* and *Parker*, the assignees of *Walsh*, for setting aside the verdict found for *Gregory*, came on to be argued in this Court, when the same was made absolute, and a verdict ordered to be entered for the defendant (a). On the 19th *February*, 1822, *Gregory* preferred another petition to the Lord Chancellor, thereby praying that the commission of bankruptcy so issued against him might be superseded, on the ground that the petitioning creditors had not, at the time of issuing the said commission, a good legal debt to support the said commission; but that the debt (if any) had been barred by the statute of limitations.—The petition came on to be heard before his Lordship on the 17th *August*, 1822, when his Lordship was pleased to order that a case should be stated for the opinion of this Court, in which the question should be, “whether, under the circumstances stated, *J. T. Taylor* and *Parker*, as assignees of the estate and effects of *Walsh*, had, at the time of suing out the commission of bankruptcy against *Gregory*, viz. on the 22d *March*, 1821, a valid debt as petitioning creditors to support the commission?” And it was ordered, that the Lord Chief Justice of the said Court should be at liberty, if he should think proper so to do, upon the argument of the said case, to use his notes of the former proceedings had before him in this matter.

The case came on for argument in the course of the last Term, when Mr. Serjeant *Taddy* for the plaintiff, contended, that at the time of issuing the commission against him, on the 22d *March* 1821, there was no valid or sufficient petitioning creditor's debt on which it could be supported. It is quite clear that a debt barred by the statute of limitations at law, cannot be proved under a commission of bankruptcy, so as to sustain it. *Ex parte Dewdney* (b). Here it

(a) See ante, vol. 6, 525.

(b) 15 Ves. 479.

is equally clear, that such debt was barred by the statute 21 Jac. I, c. 16, unless it can be brought within either of the exceptions contained in the 3d and 7th sections of that act (a), as relating to merchants' accounts, or the party's being beyond the seas. It cannot fall within the former exception, as in *Foster v. Hodgson* (b), and *Barber v. Barber* (c), the Lord Chancellor and Master of the Rolls have both held, that where there has been no item of account within six years, although the account might have been between merchant and merchant, it is barred by the statute, unless some new item has been introduced or added to it within that time. Neither can the exception as to the party's being beyond the seas affect the debt in this case, as it is found, as a fact, that the plaintiff landed at Deal, in April 1814, where he stayed several days, from which time the statute must be taken to begin to run, and which was more than six years before the commission was sued out. And in *Smith v. Hill* (d) it was held, that if a plain-

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(a) By the 3d section of which it is enacted, "that all actions of *trespass quare clausum fregit*, &c. *detinue*, *trover*, and *replevin*, for taking away goods or cattle; all actions of *account* and upon the *case*, other than such accounts as concern the trade of merchandize, between merchant and merchant, their factors or servants; all actions of *debt*, grounded upon any lending or contract without specialty, or for arrearages of rent; and all actions of *assault*, *menace*, *battery*, *wounding*, and *imprisonment*, shall be commenced and sued within the times hereafter expressed, and not after; that is to say, the said actions upon the *case*, (other than for *slander*,) *account*, *trespass quare clausum fregit*, &c. *debt*, *detinue*, and *replevin*, within six years next after the cause of such action or suit, and not after;—actions of *assault*, *battery*, *wounding*, or *imprisonment* within four years; and actions upon the *case* for words within two years next after the words spoken, and not after."—And by section 7, it is provided, that "if any person or persons, entitled to any of the said actions, shall be, at the time any such cause of action accrued, within the age of 21 years, *feme covert*, *non compos mentis*, imprisoned, or *beyond the seas*; then such person or persons shall be at liberty to bring the same actions, within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas."

(b) 19 Ves. 185.—(c) 18 Ves. 286.—(d) 1 Wils. 134.

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tiff be in *England* at the time the cause of action accrues, the time of limitation begins to run, and a subsequent departure from the kingdom, and going beyond the seas, will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time; and when a disability is once removed, and the statute has begun to run, no subsequent disability will stop the running. *Dodd v. Duroure v. Jones* (a). Although, however, it may be contended, that the plaintiff's landing at *Deal* was not such a return to this country as was contemplated by the legislature, yet the words of the statute being general, viz. "returned from beyond the seas," it would be difficult for the Court to draw a line as to the precise nature or meaning of such a return. Yet it is here found as a fact, that the plaintiff waited several days at *Deal* for a passage, and frequently called at the Vice-consul's office there, and left a letter for the captain of another vessel; and if a party actually return to any port in this country, and lands but for a moment, he is liable to be served with process, and the statute begins to run from that instant.

[Lord Chief Justice *Dallas*.—Suppose a party were driven into port by stress of weather, and was obliged to remain there till the ship was enabled to sail again, could that be deemed a return within the meaning of the statute? Here there can be no question that the plaintiff did not mean to return; for, according to a note I took at the trial, he came on shore at *Deal*, while the ship was laying off that port, for the mere purpose of putting a letter into the post-office.]

The next and principal question is, whether, under the circumstances, the entering the continuances in the action in the Court of King's Bench, can have the effect of reviving the petitioning creditor's debt, so as to take this case out of the operation of the statute; such debt being previously barred and incapable of being enforced at the time of

(a) 4 Term Rep. 310.

issuing the commission. In order to support a commission of bankruptcy, either at law or in equity, it is necessary that the debt should be one which might be made the subject matter of the commission, and of which the party suing it out might avail himself at the very time. But here the writs were allowed to remain in the Sheriff's office, and the continuances were not entered up until *after* the issuing of the commission, and the primary, if not the sole object of issuing those writs in the first instance, was to outlaw the present plaintiff, and not with a view to prevent the application of the statute. The replication, where a writ is sued out to prevent the operation of the statute, must allege that it was sued out before the expiration of the limited time, with an intent to implead and prosecute the defendant for the causes of action in the declaration mentioned, and that such writ was returned and regularly continued. Such intent is a traversable fact. So in order to avoid the operation of the statute, the proceedings must in effect be so connected as to apply to the same cause of action, and be carried on in the same Court in which the suit was originally commenced. In *Smith v. Bower* (a) it was held that an attachment of privilege was not a continuance of a bill of *Middlesex*, so as to avoid the operation of the statute, as they were different in their nature, as not bearing any analogy to one another. Still, however, the original cause of action there might have been the same; but Mr. Justice Buller said (b), "When we speak of writs being continued, we mean that it must appear on the record that the Court has, from time to time, kept the original suit alive, and that the plaintiff is proceeding to bring the defendant into Court on the suit originally commenced. But it must appear on the record that it was a continuance of the original suit." So in *Brown v. Babbington* (c), it was decided that an action of *assumpsit* cannot be considered as a continuance of an ac-

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(a) 3 Term Rep. 662.—(b) *Id.* 664.—(c) 2 Ld. Raym. 880.

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tion commenced by a writ of *clausum fregit*. These cases; therefore, shew that the proceedings by continuance must not only be in the same Court, but that they must be of the same nature, in respect of the same cause of action, and founded on the same process which was originally sued out. Besides, here the continuances were not entered up until *after* the commission of bankruptcy had issued against the plaintiff, which was not only altogether unconnected with the previous process in the action by original brought in the Court of *King's Bench*, but a new remedy was thereby given, and it cannot be possibly connected with a continuance of an action at law, as the commission is in the nature of a statutable judgment and execution:— if so, the continuances were entered too late; and although it may be said that they may be entered at any time, yet there is no instance where it has been done after judgment, although it has been in some cases allowed after verdict. Here, too, it must be observed, that the writs were not only sued out in different Courts, but *alio intuitu*, viz. with a view to the outlawry of the plaintiff; and in order to operate as a bar to the statute, the proceedings in this Court should have been founded on the same cause of action which was originally commenced in the Court of *King's Bench*. [Mr. Justice Burrough.— If no commission of bankrupt had been sued out, might not *Taylor* have gone on in the action against *Gregory*; if he had returned to this country; and if so, might not the *capias* in this Court be connected with the bill of *Middlesex*, so as to prevent the operation of the statute?] Not for the purpose of reviving the petitioning creditors' debt, as the continuances were not entered up until after the commission had been sued out; and the writ of *capias* in this Court was not a continuance of the original process, nor was it issued for that cause of action which was subsisting at the time of the commission. In *ex parte Dewdney* Lord Eldon said (a),

(a) 15 Ves. 498.

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‘ that in the consideration of the statute of limitations, a commission of bankruptcy is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those creditors, who could, by legal action, or equitable suit, have compelled payment;’ and the case of *ex parte Dewdney* was afterwards confirmed in *ex parte Roffey* (a). Here, the petitioning creditors had no legal remedy to compel payment at the time of the commission, as the continuances were not entered up until after it had issued, and as the writ in this Court cannot be connected with those that were issued in the original suit in the Court of *King’s Bench*, and as the proceedings were altogether of a different nature, viz. the one to revive a debt, the payment of which could not have been enforced at the time the commission was sued out, and the other for the purpose of proceeding to outlawry against the plaintiff; the commission, which was sued out against him in *March* 1821, cannot be supported.

Mr. Serjeant *Bosanquet, contra.*—*First*, from the course of dealings between the parties in this case, as well as the particular circumstances attending the transaction in question, it must *prima facie* be taken that the petitioning creditors’ debt, on which the commission was founded, was an item of merchants’ accounts, and as such fell expressly within the exception in the statute 21 Jac. 1, c. 16, § 3. The cases of *Foster v. Hodyson*, and *Barber v. Barber* were founded on mere equitable principles, without any analogy to proceedings in a Court of Law, and are in direct opposition to the common law decisions on the subject, all of which are collected by Mr. Serjeant *Williams*, in a note to *Webber v. Tivill* (b); and in *Cutling v. Skoulding*, Lord *Kenyon* said, that (c) “where there is no item of account at all within six years before the action brought, the plaintiff

(a) 2 Rose Bankruptcy Cases, 245.—(b) 2 Wms. Saund. 127, n. 6.

(c) 6 Term Rep. 192.

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the plaintiff had leave to amend, by adding a continuance in a penal action, and even after error brought. In *Leadbeter v. Markland (a)* it was held, that an attachment of privilege, although informal, being returnable on a general return day, instead of a day certain, was a sufficient commencement of an action to avoid the statute; and the Court said, that "the spirit of the statute of limitations was, that a suit actually begun, however informally or irregularly, was sufficient to stop the limitation." Although it has been said that the intent of suing out the writs in the original action in the Court of *King's Bench*, was merely with a view to outlaw the plaintiff, and not to implead him in this suit, yet it was sufficient to shew that an action was commenced within six years next after the cause accrued, and no subsequent irregularity can oust the party bringing it of the benefit and operation of the statute. The writs of *alias*, *capias*, and *pluries* were not only sued out for the purpose of outlawing the plaintiff, but to bring him into Court; and if he had appeared, he might have been declared against; and, in point of fact, there was no other mode of proceeding against him. There can be no doubt but that the returns of those writs were regular, and that the continuances had been properly entered up according to the cases of *Beardmore v. Rattenbury (b)* and *Taylor v. Hipkins (c)*. In the former, it appeared, on a plea of *actio non accrevit infra sex annos*, that a writ of *testatum special capias* was issued within six years, in *Michaelmas* Term, and an *alias testatum capias* in *Easter* Term following, but no writ was sued out in *Hilary* Term; and it was held sufficient to take the case out of the statute, the suit being actually, although irregularly commenced within six years: and Lord Chief Justice *Abbott* there said, that "if the suit was properly commenced, the continuances might be entered at any time, and therefore that the supposed discontinuance was not a ground of nonsuit." The proceedings in *Taylor v.*

(a) 2 Sir W. Bl. 1131.—(b) 5 Barn. & Ald. 452.—(c) *Id.* 489.

Hipkins are referrible to this very case, and it was there held, that the writs of *capias*, *alias* and *pluries*, originally issued against the plaintiff and his partner *Hipkins*, had been duly returned and filed, so as to save the statute; and that it was sufficient for that purpose if a writ be sued out, and the return thereon indorsed upon it in time; and that it was not necessary that the writ should be delivered out of the Sheriff's office as returned. That decision is founded on principle and practice, and here, as the parties had the means of obtaining the fruit of their demand at law, and enforcing payment of the debt at the time the commission issued, the continuances need not have been entered until afterwards. A person may plead a record which is not existing at the time, but it is sufficient if it be made up afterwards, so that it can be produced at the trial; and as the foundation for the original action against the plaintiff was laid by the suing out the writ of special *capias* against him and his partner, followed by the writs of *alias* and *pluries*, the continuances were properly entered up after the issuing of the commission, and there was consequently a valid and legal debt to support it against the plaintiff at the time it was sued out, and which was not barred by the statute of limitations.

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Mr. Serjeant *Taddy* in reply, submitted, that the cases of *Foster v. Hodgson* and *Barber v. Barber* were not decided on equitable principles alone, but with reference to the terms of the statute; and that the *dictum* of Lord *Kenyon* in *Catling v. Skoulding*, that the statute could in no way affect an item of merchants' accounts, was uncalled for and extra-judicial, as, in that case, there were mutual items of account, for which credit had been given within the six years. The statute in this respect should receive the same construction at law as in equity; and if so, it is quite clear that the debt in question falls within its operation and effect. As to whether the plaintiff had returned to this

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country, or within its limits, must depend on the construction of the statute of James, as coupled with that of the 4 Anne, c. 16, § 19, and must be taken in *pari materid*; the replication in both cases must allege that the action was commenced within six years after the first return of the party into this kingdom from beyond seas. What shall be a sufficient return for that purpose is not a question of law; one plaintiff might be more active than another; and if a party once sets his foot on shore, it is a circumstance a creditor might immediately avail himself of, and is such a return as to fall within the provisions of the statute; and here, as the plaintiff remained at *Deal* several days, any creditor residing there might have seen him and served him with process. There can be no intendment contrary to express words; and in *Rex v. The Justices of Staffordshire*(a), where an appeal against an order of Justices for stopping up a road was given by statute to the party grieved by any such order or proceeding, at the next Quarter-Sessions after such order made or proceedings had, &c. it was held that the appeal must be made to the Quarter-Sessions *next after* the order made, though no notice of such order was received by the appellant. So, here, it was not necessary that the parties who had sued out the writs against the plaintiff should have had notice of his return; if he was once within the kingdom it is sufficient to bring him within the operation of the statute. — With respect to the continuances, as they were not entered on the roll until after the commission had been sued out, it is of itself conclusive on the parties. That circumstance was not adverted to in the case of *Taylor v. Hipkins*, and the Court there merely decided that the continuances had been entered conformably to the practice. At the time the commission was sued out, the parties had no actual remedy against the plaintiff, nor any means to enforce the payment of the debt in question,

(a) 3 East, 151.

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and the entering up the continuances afterwards cannot have the effect of reviving a debt which was before barred by the statute. The writs of *alias*, *capias*, and *pluries*, must therefore be considered as *functi officio*, and they could not be renewed by any matter *ex post facto*. On these grounds there was no petitioning creditor's debt to support the commission against the plaintiff, at the time it was sued out, in *March*, 1821.

The Court, during the argument, intimated a strong, if not decisive opinion, that the plaintiff could not, under the circumstances, be taken to have returned from beyond the seas within the meaning of the statute, which they observed must receive a reasonable construction, and that the word *returned* was not to be grammatically considered, but looked at in general terms, and in its well known and popular sense; and that the mere treading on *English* ground could not be considered as a return; and that if a party were on board a ship off *Dover*, and there should be an alarm of fire, in consequence of which he went on shore there, and staid the night, and returned to the vessel on the following morning, it would not constitute a return within the statute. But on the other points they took time to consider.

The following certificate was afterwards sent to the Lord Chancellor:

We have made use of the notes above adverted to, have heard the case argued before us, and are of opinion, that, under the circumstances of the case, the assignees of the estate and effects of the said *Benjamin Walsh*, who are the petitioning creditors under the commission awarded and issued against the said *George Barnard Gregory*, had at the time of suing out the said commission of bankruptcy against him, viz. on the 22d *March*, 1821, a valid debt, not

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barred by the statute of limitations, as petitioning creditors, to support the said commission.

R. DALLAS.
J. A. PARK.
J. BURROUGH.

Friday,
May 30th.

WATSON'S Bail.

Where a person who came up to justify as bail had recently taken the benefit of the insolvent debtors act, which was unknown to the defendant or his attorney, until the morning of justification, the Court would not allow time to add and justify another; as if bail are opposed, time can only be given where their justification is prevented by an act of God.

MR Serjeant *Pell* applied for leave to justify one of the bail in this cause, and for time to add and justify another, on an affidavit, which stated that one of them had lately taken the benefit of the insolvent debtors act; which circumstance was not known to the defendant or his attorney until this morning.

Mr Serjeant *Vaughan* having stated that he had received instructions to oppose them—

The Court refused the application; and **Mr** Justice *Park* observed, that when bail are opposed, time can only be given where they are prevented from justifying by an act of God, such as illness, or an unforeseen accident.

Bail rejected.

Saturday,
May 31st.

MILLER v. JAMES and Another.

Where the defendants' attorney, on their being sued by the plaintiff, undertook, by letter, to procure their signature to a *cognovit*, for the payment of debt and costs, which he failed to do, but the plaintiff afterwards said that he would proceed with the action:—Held that this was virtually a waiver of the attorney's undertaking, and that he could not be called on by the Court to perform it.

MR. Serjeant *Bosanquet* in the last Term obtained a rule *nisi*, calling on **Mr.** *Fosbrooke* an attorney of the Court of *King's Bench*, to shew cause why he should not perform his undertaking to get a *cognovit* signed by the defendants in this cause, and why he should not pay the plaintiff the costs of this application. He founded his motion

on an affidavit, which stated that, in *December* last, a writ of *capias ad respondendum* was sued out by the plaintiff in this cause, and served on the defendants, for the purpose of recovering a debt of 16*l.* and upwards, due from them to the plaintiff: that *Fosbrooke* acted as their attorney, and as such, applied to the plaintiff's attorney to settle the action; and proposed that the defendants should give a *cognovit* for the payment of the debt and costs, which was acceded to; that *Fosbrooke* accordingly prepared and sent to the plaintiff's attorney the form of a *cognovit*, which was altered by him, and afterwards approved of by *Fosbrooke*, to whom it was returned for engrossment and signature of the defendants: that on the 24th *January* last, the plaintiff's attorney, after application for the *cognovit*, received a letter from *Fosbrooke*, stating, that he would undertake to get it signed by the defendants: that the plaintiff's attorney had since made several applications to *Fosbrooke*, for the *cognovit*; but that he had positively refused either to sign it himself, or get it signed by the defendants.

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Mr. Serjeant *Taddy* now shewed cause, on affidavits which stated in substance, that *Fosbrooke* had made repeated applications to the defendants, and had also applied to the father of one of them, to solicit his interference to procure their signature to the *cognovit*, but without avail, and that on his afterwards informing the plaintiff, that the defendants had refused to sign; he said, that he did not wish to be severe, but that he would immediately proceed with the action. The learned Serjeant submitted, that as the undertaking by *Fosbrooke* to obtain a signature to the *cognovit* was only made on behalf of his clients, he could not be deemed personally liable on his mere undertaking that they should do so; and that, at all events, there had been a waiver of such undertaking by the plaintiff's having afterwards stated that he would proceed with the action.

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Mr. Serjeant *Bosanquet*, in support of the rule, relied on the case of *ex parte Hughes* (a), where the Court of *King's Bench* compelled an attorney, pursuant to his undertaking, to procure the signature of his client to an agreement of reference, and to find security for the performance of an award. Here, the undertaking to procure the defendants' signatures to the *cognovit*, was given to the plaintiff's attorney by *Fosbrooke*, who acted as attorney for the defendants in the cause. The plaintiff merely said, that he did not wish to be severe; but that could not operate as a waiver of *Fosbrooke's* undertaking: it is clear, therefore, that it may be enforced as against him, as he positively undertook that the signatures should be procured.

Mr. Justice PARK (b).—This is an application to the discretion of the Court; and the question is, whether *Fosbrooke* could be compelled by attachment to procure a signature to a *cognovit*, proposed to be given by his clients to the plaintiff's attorney. On taking all the circumstances into consideration, I think he could not. Although there has not been, strictly speaking, a waiver by the plaintiff, as he has not actually taken any further step in the action, still there has been virtually so. On the 24th *January*, *Fosbrooke* undertook in writing to get the *cognovit* signed; and it appears that he applied repeatedly to both the defendants for that purpose, who positively refused to do so. That he afterwards made an application to the father of one of them, and that a few days afterwards he saw the plaintiff, who said that he must immediately proceed with the action. I am, therefore, of opinion that this was virtually a waiver by the plaintiff, and that this rule must consequently be discharged.

Mr. Justice BURROUGH.—I am of the same opinion. It ap-

(a) 5 Barn. & Ald. 482 — (b) Lord Chief Justice Dallas was absent.

appears to me, that *Fosbrooke* did all in his power to endeavour to get the *cognovit* signed by the defendants, and if it had been done, the plaintiff could not have proceeded with the action.

Rule discharged without costs.

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MACKINTOSH v. BLYTH and Another.

Wednesday,
June 4th.

MR Serjeant *Lens*, on the first day of this Term, obtained a rule to shew cause, why the Prothonotary should not review his taxation of costs in this cause, and why he should not be directed to allow the plaintiff his costs of, and occasioned by, a second reference to an arbitrator, to whom this cause had been referred, together with the costs of this application. He founded his motion on an affidavit, which stated, that this cause came on for trial at *Guildhall*, at the sittings after *Trinity Term*, 1822, and was by consent referred to a barrister to ascertain what verdict ought to be given; and his certificate was to be entered up as the verdict of the jury: that he afterwards made his certificate, and awarded that a verdict should be entered for the plaintiff for the sum of 62*l.* 14*s.* 6*d.*, and that, at the time of making such certificate, he verbally communicated to the parties, that each of them should pay his own costs of the reference, to which they acceded: that in the last *Michaelmas Term*, a rule nisi was obtained, on behalf of the defendants, requiring the plaintiff to shew cause, why the certificate of the arbitrator, and the verdict entered thereupon, should not be set aside, and a new trial granted; and on cause shewn, the Court ordered the cause to be referred back to the arbitrator, for him to reconsider his award, and make such alteration therein as should appear to him to be fit: that he afterwards omitted to give any direction as to the costs of the second reference in the last certificate:—Held, that the plaintiff was entitled to them, as, in the absence of any specific direction to the contrary, such costs must follow the verdict as a matter of course.

Where, by an order of reference, all matters in difference were referred to an arbitrator, who was to ascertain and certify what verdict ought to be given, and his certificate was to be entered up as the verdict of a jury; and he certified that a verdict should be entered for the plaintiff for a certain sum, and told the parties, that each should pay his own costs of the reference, which was acceded to by them; and on a motion to set aside the certificate, the Court ordered the cause to be referred back to the same arbitrator, when he certified to the same effect,

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wards published another certificate, and again awarded that a verdict should be entered for the plaintiff, for the same sum as awarded in the first certificate, and communicated to the defendant's attorney, that the costs of the second reference should follow the costs of the cause, but that he did not so express it on the face of the second certificate: that on the taxation of costs before the Prothonotary, the defendant's attorney objected to his allowing the costs of the second reference to the plaintiff; and contended, that, as the second certificate was silent as to costs, the plaintiff could not be entitled to claim them: that the Prothonotary accordingly objected to allow them, unless the arbitrator would give such a certificate as would enable him to do so; but that the defendant's attorney refused to assent to the arbitrator's making any alteration in his certificate; on which the Prothonotary disallowed the plaintiff the costs.

Mr. Serjeant *Taddy* now shewed cause, and submitted, that as by the terms of the original order of reference, all matters in dispute between the parties were referred to an arbitrator, who was silent in his certificate as to the payment of costs; the Prothonotary was right in not allowing those of the second reference. The order was in terms that the jury should find a verdict for the plaintiff, 250*l.* damages, subject to the award of an arbitrator, to whom all matters in difference were referred; and he was to ascertain what verdict should eventually be entered up. The subject matter of the dispute between the parties, as well as the disposition of costs, were wholly vested in the arbitrator, who merely ordered a verdict to be entered for the plaintiff, for a certain sum. If the arbitrator was only empowered by the terms of the reference, to enter a verdict, the costs would follow as a matter of course, as he would be substituted for the jury; but here, all matters in difference were referred to him, and the Court cannot intend that the

costs were to follow the sum found by him, as he has taken no notice of them in his certificate, and it is quite clear that he cannot now alter such certificate, respecting his intention as to the payment of costs, as in *Irvine v. Elton* (a), it was determined, that after the delivery of an award, the arbitrator cannot, though within the time limited by the submission, correct a mistake, even in the calculation of figures, by making another award; on the ground, that an arbitrator's authority, having been once completely exercised pursuant to the terms of the reference, is at an end, and cannot be again revived.

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Lord Chief Justice DALLAS.—I entertain no doubt whatever as to this case. If it had been left to the arbitrator generally as to the amount of the verdict, it would be clear that the costs would follow such verdict. It is a well known rule, that every intendment must be made in favour of an award; and it seems to me to be not only a fair, but necessary intendment, that the costs of the second reference were to follow the verdict.

Mr. Justice PARK.—If the jury had found a verdict for the same sum as awarded by the arbitrator, the costs would follow as a matter of course; and it would be an act of great injustice, if they were not allowed to the plaintiff.

Mr. Justice BURROUGH.—The Court are not to presume that any other matters were referred to the arbitrator besides those for which he has ordered the verdict to be entered. We are not to say whether it was to be entered for 250*l.* or not, but the arbitrator has determined, that the plaintiff was entitled to 62*l.* 14*s.* 6*d.*; and it appears to me that the costs must follow as a matter of course; and more particularly so, as he has given no directions to the contrary.

Rule absolute.

(a) 8 East, 54.

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Wednesday,
June 4th.

In a Matter of Complaint against ISAACSON, CLARK, and BROOKES.

Where, on an application to strike two attorneys off the roll, and commit a third person to the Fleet prison, for practising in their names, he not being an attorney; the Court ordered the parties to be attached, and give bail to answer interrogatories before the Prothonotary, who reported them to be in contempt for not having satisfactorily answered the interrogatories put to them:—Held, that such report was not conclusive on the parties; but that they might take exceptions to any specific or material parts of it. And where after the Prothonotary had made his report, it appeared that certain books of account had not been laid before him, which tended to support the answers given by one of the parties; the Court ordered the Prothonotary to inspect them, but would not allow a clerk who had made the entries therein, to be examined by the Prothonotary, on an application made by the prosecutor for that purpose.

Mr. Serjeant *Vaughan* having, in Trinity Term, 1822, obtained a rule, calling on *Isaacson* and *Clark* to shew cause why they should not be struck off the roll of attorneys of this Court, and on *Brookes* to shew cause why he should not stand committed to the custody of the Warden of the Fleet, for practising as an attorney in the names of *Isaacson & Clark*, he not being an attorney at the time, and why the three persons above named, should not, at the time of shewing cause, answer all and every the matters contained in several affidavits imputing gross misconduct and malpractices to them, and that they should also severally attend the Court in person:—

Mr. Serjeant *Pell*, in Michaelmas Term last, shewed cause on several affidavits, which the Court considering to be unsatisfactory, and not affording a sufficient answer to the application, they required further information, and referred to the case of *In re Crossley (a)*, where, on an attorney's being required to answer the matters of an affidavit imputing malpractices to him, he swore in his exculpation to an incredible story, the Court granted an attachment against him, although he positively denied the malpractices imputed to him; and on the authority of that case, the Court ordered the parties to be attached, and give bail in 100*l.* each, and two sureties in 50*l.* each, to answer interrogatories before the Prothonotary, and the rule was accordingly enlarged for that purpose.

In Hilary Term last, Mr. Prothonotary *Watlington* reported the parties to be in contempt, as neither of them

(a) 6 Term Rep. 701.

had sufficiently answered the matters of the interrogatories put to them.

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Mr. Serjeant *Pell* then objected to the report, and stated, that he was prepared to shew that the Prothonotary was not warranted in coming to the conclusion he had drawn; and that at all events the parties charged were entitled to be heard against it; and that it could not be deemed conclusive as against them. If the report of the Prothonotary may be reviewed in a matter relating to the taxation of costs, *a fortiori* it ought to be done in this instance; and the Court should ascertain the grounds on which the Prothonotary had decided, before they proceeded to give judgment in a case of a criminal nature, and on which the future credit and interests of the parties wholly depended. The matters in question were referred to the consideration of the Prothonotary, for the mere purpose of expediting the enquiry, and for the information and in ease of the Court; and it would be most unjust if they did not enquire into the nature of the answers which the parties had given to the interrogatories so ordered to be put to them.

Mr. Serjeant *Vaughan*, *contra*, insisted, that as the Prothonotary had reported the parties to be in contempt, the rule ought to be made absolute as a matter of course.

But the Court observed, that, as the parties had been brought before them and fully heard on affidavits, this case could not be assimilated to a question as to costs, of which the Court must be entirely ignorant, until the Prothonotary was called on to make his report. The only case that can be assimilated to the present as to the practice in cases of this description, is that of *Rex v. Wheeler* (a), where a party being in contempt for filing a bill in Chancery to set aside an award, after entering into a rule of Court to abide by it; the Court made a rule absolute for an attachment

(a) 3 Burr. 1256.

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against him, on which he was taken up, and interrogatories were filed, on which he was examined, and reported to be in contempt, and on his being brought up to receive the judgment of the Court, it appearing that he had dismissed the bill in *Chancery*, and paid all the costs attending it; the Court were unwilling to punish him further by fine and imprisonment, and waved giving judgment by consent. The course there adopted appears to be the ordinary proceeding in the case of a contempt, and when a matter of this nature is referred to the Prothonotary, he must be considered to stand in the situation of the Court; and in the *King's Bench* the rule is, that if the Master report a party not to be in contempt, the rule for an attachment is discharged; but if otherwise, it is made absolute.

Mr. Justice *Burrough* observed, that he remembered a case in that Court where a barrister had been reported to be in contempt, and that he wished to address the Court on his behalf, but that he was not allowed so to do.

The Court then said that they would make further enquiries as to the practice, and directed the case to stand over until the last Term, on the parties entering into fresh recognizances to appear on a certain day within it, and the rule was enlarged accordingly.

Mr. Serjeant *Pell* then produced affidavits by *Clark* and *Brookes*, that they had been unable to obtain office-copies of the interrogatories, on account of their poverty. He observed, that no case could be found as to the mode of proceeding in this Court, in a cause of this description; but that in the *King's Bench*, where a matter is referred to the Master, and he has examined the parties and witnesses, and reports to the Court, they act upon his report according to their own discretion; and here, as the parties only were before the Prothonotary, his report might be excepted to

in whole or in part, and the Court must be satisfied that the answers to the interrogatories were so unsatisfactory as to justify them in causing two of the parties to be struck off the roll, and the third to be imprisoned; and more particularly so, as the duration of his confinement must depend entirely on the nature of the answers he has put in. At all events, they are entitled to the indulgence of the Court. [Mr. Prothonotary *Wattlington* stated several of the answers which he considered to be by no means satisfactory, but as tending to evade the interrogatories altogether, which went to enquire as to whether the business was not carried on colorably between the parties; and as to the relative characters in which they stood with regard to each other.] The whole of the interrogatories and answers ought to be read, and not excepted parts only, and all the transactions between the parties should be fully made known to the Court, before justice can be afforded them, and to which they are manifestly entitled.

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Mr. Serjeant *Vaughan*, *contra*, referred to *Tidd's Practice* (a), where it is said, "that, if the Prothonotaries, (to whom a matter of this nature is generally referred), report that the party is in contempt, the Court of *Common Pleas* will commit him to the *Fleet* prison; but if the report be in his favour, they will order him to be discharged, or his recognizance to be vacated." And the case of *Rex v. Wheeler* is referred to in support of that position.

The Court remarked that they had made enquiries as to the practice in the Court of *King's Bench*, and found that when a reference of this description was made to the Master, his report was considered as binding and conclusive, unless an exception were pointed out to some specific part of it. So here, if any of the answers can be pointed out as being satisfactory, which the Prothonotary has considered

(a) Vol. 1, 7th edit. 494.

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not to be so, the report cannot be deemed conclusive in that respect, and more especially so, as it affects the liberty of the subject. Still, however, it would be too much to have the whole of the proceedings which took place before the Prothonotary read in Court, as it would be not only contrary to the practice, but would tend to lessen the authority of the officer to whom the enquiry was directed. The parties might have taken office-copies of the interrogatories, but they are not to object to the report *in toto*. The Court then directed that Mr. Serjeant *Pell* should be furnished with a copy of the interrogatories and answers, and that on his having inspected them, he might object to any particular answers which he might consider to be satisfactory, and which the Prothonotary had deemed to be otherwise; and the matter again stood over for that purpose.

The learned Serjeant afterwards submitted, that the greater part of the interrogatories had been not only fully, but most satisfactorily answered, and that even those which the Prothonotary had considered not to be so, were answered in substance, so as not to render the parties amenable to be struck off the roll of the Court, and more particularly so as to *Clark*; as it turned out that he was not an attorney of this Court, and the malpractices imputed to *Isaacson* were also insufficient for that purpose. If one of his answers is to be deemed unsatisfactory, can that be a ground to strike him off the roll, and thereby lead to his ultimate ruin? The learned Serjeant then proceeded to support the answers excepted to by the Prothonotary, at considerable length, and submitted, that if the parties had been guilty of perjury, they were amenable for it, and that the prosecutor had his remedy by indictment.—It appeared, however, that certain books of account belonging to *Brookes*, and which were material to support several of his answers, to shew that he acted as managing clerk to *Isaacson*, and receiv-

ed a salary for his services, had been shewn to the Secondary, when the interrogatories were filed with him, but had not been handed over to the Prothonotary, nor had any of the entries therein been explained to him, although the Secondary had advised that the books should be laid before him. — The Court, considering that these books were material to shew how the business had been carried on, directed the matters to be referred back to the Prothonotary, who was to inspect the books, and make a further report accordingly.

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ISAACSON
In re.

Mr. Serjeant *Vaughan* now moved that the Prothonotary might examine a person by the name of *Turner*, who was a clerk to *Isaacson*, and by whom several entries and erasures had been made in some of those books. But it appearing that the application was made on the part of the prosecutor. —

The Court observed, that he had no right to require it, as they merely directed that the books should be produced before the Prothonotary, and if it were necessary, the parties accused might be called on to explain their contents, and if they did not satisfactorily do so, the officer might report them to be in contempt. If the Prothonotary thought it necessary to call on *Turner*, to explain any of the entries, or erasures, he had a right to do so; but it would be too much to allow the prosecutor such a privilege, when the Prothonotary had not required it, or expressed any dissatisfaction on the subject. The learned Serjeant therefore took nothing by his motion (a).

(a) For the mode of proceeding in a case of this description, see *Impey's Practice*, C. P. 6th edit. 525.

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Wednesday,
June 4th.

LOWE v. LOWE.

The Court refused to stay proceedings in an action of trover, on an affidavit by the defendant that the plaintiff's cause of action did not amount to forty shillings; the amount of the value of the article sought to be recovered by such action being mere matter of calculation, to be ascertained by a jury.

MR. Serjeant *Taddy* in the last Term had obtained a rule nisi, that all further proceedings in this cause might be stayed, on the ground that the plaintiff's cause of action, if any, did not amount to 40s. He founded his motion on an affidavit of the defendant, which stated, that in *October* last, he was applied to by the plaintiff's attorney, to deliver to the plaintiff two loads of potatoes claimed by him from the defendant; that the plaintiff never made any other demand; that a load consists of three bushels, and that the average price of potatoes in the neighbourhood of the plaintiff and defendant, was not so high as 2s. *per* bushel, and did not exceed that price at the time the demand was made, and that the plaintiff had filed a declaration in this action against the defendant in trover, for the potatoes, and that he never had any other claim or demand against him. Under these circumstances, the learned Serjeant submitted, that the action was within the jurisdiction of the county court, and had therefore been improperly commenced in this Court.

Mr. Serjeant *Onslow* now shewed cause, and submitted, that, the application to stay the proceedings was too late, as the defendant had not only pleaded, but issue was joined before it was made, and that the cause was now set down for trial at the next assizes for *Chester*. Besides, it must be considered that this is an action of trover, and sounds in damages only, and the amount to be recovered is altogether uncertain, and cannot be ascertained. In *Fisher v. Prince* (a), it was decided that a specific thing demanded in trover, might in some cases be brought into Court, or delivered to

(a) 3 Burr. 1364. S. C. 2 Sir W. Bl. 902.

the plaintiff; but that Mr. Justice *Wilmot* there said (a), "where there is an uncertainty either as to quantity or quality of the thing demanded, or there is any tort accompanying it, that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, the specific thing demanded could not be brought into Court." Although the county court may have jurisdiction in trespass, under the statute of *Gloucester*, (6 *Edw.* 1, c. 8,) still it can have none in trover, as the damages are altogether uncertain, and may be enhanced beyond the actual value of the thing for which the action is brought.

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Mr. Serjeant *Taddy* in support of the rule, contended, that the application was not made too late, and relied on the case of *Kennard v. Jones* (b), where, it appearing to the Court that the debt sued for was under 40s., they ordered the proceedings to be stayed, although the defendant was under short notice of trial; and Lord *Kenyon* there observed (c), that "the statute 6 *Edw.* 1, c. 8, expressly prohibited parties from suing in the superior Courts for a sum under 40s." Although where a question of great importance may be raised in an action of trover, by taking an article of trifling value, the Court will not interfere; yet if it does not embrace a matter of right, and the action is only brought to recover the value of the article, as in this case, and which has been sworn by the defendant not to amount to 40s. and which has not been denied by the plaintiff, the Court will order the proceedings to be stayed. *Wellington v. Arters* (d). At all events, the county court has jurisdiction in a case of this description, as it is only limited to cases of trespass *vi et armis*, in which a fine is payable to the king; but all personal actions may be tried

(a) 3 Barr. 1364.—(b) 4 Term Rep. 495.—(c) *Id.* 496.—

(d) 5 Term Rep. 64.

1823.

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v.

LOWE.

there. In the 2nd *Institute* (a), Lord Coke, in commenting on the statute of *Gloucester*, observed, that "writs of trespass are here put but for an example, for debt, detinue, covenant, and the like, but if the trespass be *vi et armis*, where the king upon the conviction of the defendant shall have a fine, there the sheriff in his county cannot hold plea of it, for no Court can assess a fine but a Court of record, because a *capias* to take the body is incident to it." So in the 4th *Institute* (b) it is said, "the county court holdeth no plea of any debt or damages to the value of 40s. or above, nor of any trespass done *vi et armis*, because a fine is due thereby to the king: but of debt, detinue, trespass, and other actions personal above 40s., the sheriff may hold plea by force of a writ of *justicies* to him directed, for that is in nature of a commission to him, and is *vicontiel* and not returnable." Here therefore, as it was sworn by the defendant that the plaintiff's cause of action is under 40s. and which is not contradicted by him, it is a sufficient ground for the Court to interfere, without going into any reasons as to the nature of the plaintiff's demand.

But the Court observed, that issues of the most important description might be tried in an action of trover; that the damages in such cases rested on measure and value, that the one was a mere matter of calculation, and the other depended on the quality of the article. A load might be either three bushels, or a waggon load; besides, there is no case similar to the present, where an application of this nature has been granted. *Kennard v. Jones* differs materially from it, as there the cause of action was a money debt, and Mr. Justice Buller said, that "the practice had been not to grant rules to stay proceedings, in cases of this description, unless the demand appeared to be under 40s. *on the record*." There too, it was admitted by

the plaintiff's attorney, that the debt was only 11. 11s. 6d., and the fact of the demand being under 40s. was not contradicted. Here, however, the value of the potatoes is a mere matter of calculation to be ascertained by a jury, and the action of trover has no resemblance whatever to a common money action.

Rule discharged with costs.

KYNASTON v. LIDDELL and Others.

Thursday,
June 5th.

MR. Serjeant *Taddy*, in the last Term, obtained a rule *nisi*, that an award which had been made in this cause, in *October* last, and which was an action on a policy of insurance against the several defendants, as underwriters, and who had entered into the usual consolidation rule, might be referred back to the arbitrator to insert therein the different sums due to the plaintiff from each of the defendants, separately, instead of the aggregate sum which he had awarded to be due to him from the underwriters at large.

Where several underwriters to a policy had entered into a consolidation rule, by which they undertook to abide the event of the verdict, and the cause was referred by consent before trial, and the arbitrator awarded the aggregate sum due to the assured from the underwriters at large; the Court would not order it to be referred back to the arbitrator to insert the amount of the sum due and payable from each underwriter individually, without the consent of such underwriters.

Mr. Serjeant *Bosanquet* now shewed cause, and submitted, first, that the application was too late, as two Terms had elapsed before it was made; and secondly, that this Court had no jurisdiction to order it to be referred back to the arbitrator, but that the application, (if any), ought to have been in the alternative, viz. either to set aside the award, or to open the consolidation rule.

Mr. Serjeant *Taddy*, in support of the rule, contended, that the Court had competent jurisdiction over all the defendants, as they were parties to the consolidation rule; and therefore, that they were bound to pay the plaintiff according to their several and individual proportions, and that the award ought to be altered in that respect.

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KYNASTON
v.
LIDDELL.

But the Court observed, that at this distance of time they could not direct it to be referred back to the arbitrator without the consent of the parties: that it appeared by the order of reference, that they consented to arbitration before trial, and that by the consolidation rule the defendants only undertook to abide the event of the verdict. They regretted that they were not empowered to grant the application which they observed was founded in justice, and ought to be carried into effect if possible. But, on Mr. Serjeant *Bosanquet's* intimating that the defendants would not consent,

Rule discharged.

Thursday,
June 5th.

WILLIAMSON v. Sir GEORGE GOOLD, Bart. in the Matter of
HENRY MICHAEL GOOLD.

Where a surety taken in execution, under a judgment entered up on a warrant of attorney, given by him to secure the payment of an annuity, obtained an order to be discharged out of custody, on payment into Court of the balance which might be found due to the grantee, on taking an account before the Prothonotary; and the principal afterwards succeeded in setting aside the annuity deed and other securities on which it was founded, upon the ground of an illegal retainer of part of the consideration money, on payment of the balance which might be found to be due to the grantee, on an account to be taken by the Prothonotary; and the surety afterwards applied to be discharged out of custody, on the ground that the deeds were set aside as against his principal: the Court refused to interfere, unless he had previously paid the balance into Court, according to the terms of the first order, or would give security to the Prothonotary to cover the amount which might ultimately be found to be due from his principal to the grantee of the annuity.

THE defendant having been taken in execution under a judgment entered up on a warrant of attorney, given by him as surety for his brother *Henry Michael Goold*, to secure the payment of an annuity granted by the latter to the plaintiff, who had received certain payments in respect thereof:—the Court, in the last *Hilary* Term, ordered the defendant to be discharged out of custody, on payment into Court of the balance which should be found due to the plaintiff, after giving credit for the advances which had been made to him on account of the annuity, the amount of which balance was to be ascertained and settled by the Prothonotary (*a*). In the last *Easter* Term (*viz.* on the 6th May)

(a) See *ante*, Vol. VII. 379.

the defendant's brother, *Henry Michael Goold*, succeeded in setting aside the annuity deed and other securities on which it was founded, on the ground of an illegal retain-er of part of the consideration money by the agent of the grantee, on the terms of an account being taken before the Prothonotary, who was to ascertain what sum might be due to the plaintiff in respect of principal and interest, and to report the balance; and the Court ordered, that on the payment of such balance, when confirmed by them, the deeds should be delivered up to be cancelled; the judgment which had been entered up vacated; and all further proceedings stayed (a).

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Mr. Serjeant *Lens*, on the following day, viz. the 7th *May* last, obtained a rule, calling on the plaintiff to shew cause why the judgment which had been signed in this cause, and all the several subsequent proceedings thereon should not be set aside, and the defendant discharged out of custody as to this action. The learned Serjeant submitted; that as the plaintiff had obtained a separate judgment against the defendant, who was merely a surety, that he was entitled to his discharge, although he had not complied with the terms of the former rule in *Hilary* Term last, as the Court had decided, in the last Term, that the judgment could not be sustained against his brother, as the principal or grantor of the annuity.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Taddy* now shewed cause, and observed, that if this rule were allowed to be discussed, and the application entertained, it would have the effect of opening all the matters that came before the Court in the course of the arguments in both the former rules. The defendant has not disputed the validity of the annuity, or that a balance was not due to the plain-

(a) See *ante*, 109.

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tiff, and which now remains unsatisfied : and the validity of the deeds was never attempted to be disputed by him until the rule obtained by his brother was disposed of, when he immediately made this application ; and it appears that none of the money which the Court ordered the parties to pay, has yet been received by or on account of the plaintiff, nor has the balance been paid into Court by the defendant, according to the terms of the original rule (a). Besides, the defendant's brother has lately become insolvent, and it is therefore but just that the defendant should remain in custody until it is ascertained by the Prothonotary what sum is actually due from the former to the plaintiff.

Mr. Serjeant *Lens*, and Mr. Serjeant *Cross*, in support of the rule, contended, that as there was a separate judgment against the defendant as surety, it must be considered as collateral to that which had been entered up against his brother as the principal, and which the Court had ordered to be set aside; that the defendant was, in every sense of the word, a mere surety; that he had received no part of the consideration for which the annuity was granted, nor did he join in such grant, and he was not even privy to the contract. At all events, as this is an application to the discretion of the Court, they will, under the circumstances, consider the defendant as being entitled to be discharged out of custody. In *Straton v. Rastall* (b) it was determined, that where an annuity bond, granted by two, became void by the neglect of the grantee, in not registering a memorial under the statute 17 Geo. 3, c. 26, he could not recover back any part of the consideration money from the one who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in signing a receipt for it. This case is far stronger in favour of the defendant; and, on its be-

(a) See *ante*, Vol. VII. 579.

(b) 2 Term Rep. 366.

ing discovered, since he made his first application to the Court, that the securities on which the annuity was founded were void, there is nothing to support the judgment and execution under which he is now detained in custody; and as the annuity deed has been set aside as against the principal, the defendant, as his surety, must at all events be discharged from his responsibility as to the payment of the annuity.

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Lord Chief Justice DALLAS.—The only question now before the Court arises on the nature of the present application; it is therefore unnecessary to consider the effect of any other that might have been made. When the rule in the last Term was disposed of, as against the defendant's brother, as principal, he was ordered to pay such sum as the Prothonotary might find to be the balance due from him to the plaintiff, as the grantee of the annuity. This the Court required to be done by the principal, before the annuity could be set aside; and the defendant, as his surety, now seeks to be discharged out of custody, although such payment has not been made, nor the terms of that rule at all complied with. The defendant does not merely seek to be put in the same situation as his brother, but to be discharged out of custody; and the Court ordered the latter to attend the Prothonotary, who was to take an account of what might be due from him to the plaintiff. The liability of the defendant, as his surety, still continues subject to that account. No new facts were introduced when this application was made, and the rule against the defendant's brother still continues in force. It would be, therefore, too much to allow the defendant to be discharged, either without paying the balance which might be found due to the plaintiff into Court, or giving sufficient security to the Prothonotary for that purpose. The defendant lately made an application for his discharge before me at chambers, submitting, that it was not incumbent on

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his brother to pay until the account had been taken and adjusted by the Prothonotary. If he, as the principal, had complied with the terms of the rule made by the Court in the last Term, it would be a different question; but it would be against the justice of the case to discharge the defendant, without his giving any security in case of default of payment of the balance by his principal. I am therefore of opinion, that under these circumstances, this rule must be discharged: and I beg it to be understood, that the account ought to be taken by the Prothonotary as soon as possible, and that if either of the parties should impede its adjustment, he will immediately state it to the Court.

Mr. Justice PARK.—I am of the same opinion. The defendant may be discharged, on his giving a proper security to the Prothonotary to pay the sum which may ultimately be found by him to be due, on the settlement of the accounts between the parties. His brother, as the principal, was to be discharged from the annuity on those terms, which have not yet been complied with. This application is in the nature of a corollary, arising out of the former rule; and the defendant may be entitled to his discharge, either on his giving security for the balance, or on paying it into Court. In *Straton v. Rastall*, the action was brought to recover back money as against a surety, in an action for money had and received; but when this case first came before the Court, we intended that justice should be administered to all parties, and that on payment of what should be found due to the plaintiff by the principal, the defendant, as his surety, might be permitted to go at large. If it appeared that the principal had made any payment since his application to the Court, it would be a different question. So, if there were any new grounds for this application, the motion should have been founded on them, and framed accordingly. The principal could only have been discharged from the annuity on compliance with the con-

ditions imposed on him by the Court; and a surety cannot be placed in a better situation than his principal, for the former is to be answerable in case of non-payment of the sum found to be due from the principal by the Prothonotary. It therefore appears to me that the defendant is equally liable with his brother, until the balance due from him to the plaintiff has been ascertained and paid.

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Mr. Justice BURROUGH.—If either of the former rules had been complied with in terms, it would have been quite a different question. I fully agree with my Lord Chief Justice, and my Brother *Park*, that the defendant cannot be discharged without giving security to the satisfaction of the Prothonotary, or paying the money due from his brother to the plaintiff into Court, according to the terms of the original rule. At all events, he should not have made this collateral application: but either ought to have applied to have the former rule set aside, or introduced new facts on which the present might have been sustained.

Rule discharged.

BLACKBOURN, Plaintiff; BROWN and Wife, and Others,
Deforcianta.

Saturday,
June 7th.

Mr. Serjeant Pell, on a former day in this Term, had obtained a rule, calling on the clerk of the warrants, enrolments and estreats of this Court, or his deputy, to shew cause, why he should not forthwith file the plaintiff's warrant of attorney, for prosecuting the writ of covenant for levying a fine between the said parties; and thereupon mark such writ of covenant with the usual stamp of his office, and why he should not pay to the plaintiff and deforcianta the costs of this application. He founded his

Where an attorney had omitted to pay his termage fees to the clerk of the warrants, in compliance with the rule of Court, E. T. 31 Geo. 2:—Held, that the latter officer was justified in not allowing a

warrant of attorney in passing a fine to be filed, until the arrearages of such fees were paid.

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his brother to pay until the account had been taken and adjusted by the Prothonotary. If he, as the principal, had complied with the terms of the rule made by the Court in the last Term, it would be a different question; but it would be against the justice of the case to discharge the defendant, without his giving any security in case of default of payment of the balance by his principal. I am therefore of opinion, that under these circumstances, this rule must be discharged: and I beg it to be understood, that the account ought to be taken by the Prothonotary as soon as possible, and that if either of the parties should impede its adjustment, he will immediately state it to the Court.

Mr. Justice PARK. — I am of the same opinion. The defendant may be discharged, on his giving a proper security to the Prothonotary to pay the sum which may ultimately be found by him to be due, on the settlement of the accounts between the parties. His brother, as the principal, was to be discharged from the annuity on those terms, which have not yet been complied with. This application is in the nature of a corollary, arising out of the former rule; and the defendant may be entitled to his discharge, either on his giving security for the balance, or on paying it into Court. In *Straton v. Rastall*, the action was brought to recover back money as against a surety, in an action for money had and received; but when this case first came before the Court, we intended that justice should be administered to all parties, and that on payment of what should be found due to the plaintiff by the principal, the defendant, as his surety, might be permitted to go at large. If it appeared that the principal had made any payment since his application to the Court, it would be a different question. So, if there were any new grounds for this application, the motion should have been founded on them, and framed accordingly. The principal could only have been discharged from the annuity on compliance with the con-

ditions imposed on him by the Court; and a surety cannot be placed in a better situation than his principal, for the former is to be answerable in case of non-payment of the sum found to be due from the principal by the Prothonotary. It therefore appears to me that the defendant is equally liable with his brother, until the balance due from him to the plaintiff has been ascertained and paid.

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Mr. Justice BURROUGHS.—If either of the former rules had been complied with in terms, it would have been quite a different question. I fully agree with my Lord Chief Justice, and my Brother *Park*, that the defendant cannot be discharged without giving security to the satisfaction of the Prothonotary, or paying the money due from his brother to the plaintiff into Court, according to the terms of the original rule. At all events, he should not have made this collateral application: but either ought to have applied to have the former rule set aside, or introduced new facts on which the present might have been sustained.

Rule discharged.

BLACKBOURN, Plaintiff; BROWN and Wife, and Others,
Deforciant.

Saturday,
June 7th.

Mr. Serjeant Pell, on a former day in this Term, had obtained a rule, calling on the clerk of the warrants, enrolments and estreats of this Court, or his deputy, to shew cause, why he should not forthwith file the plaintiff's warrant of attorney, for prosecuting the writ of covenant for levying a fine between the said parties; and thereupon mark such writ of covenant with the usual stamp of his office, and why he should not pay to the plaintiff and deforciant the costs of this application. He founded his

Where an attorney had omitted to pay his termage fees to the clerk of the warrants, in compliance with the rule of Court, *E. T. 31 Geo. 2*:—Held, that the latter officer was justified in not allowing a

warrant of attorney in passing a fine to be filed, until the arrearages of such fees were paid.

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motion on an affidavit, which stated, that a clerk to the agents in town of Messrs. *Walker & Son*, of *Spilsby*, in the county of *Lincoln*, called on the 23d *May* last, at the office of the clerk of the warrants, and requested him to file the warrant of attorney for prosecuting the writ of covenant for levying the above fine, which he refused to do, alleging that *Walker* the elder, one of the commissioners before whom it was taken, was an attorney of this Court, and stood indebted to the office in upwards of 3*l.* for termages: and that he would not file the plaintiff's warrant of attorney, or pass the fines through the office, without payment of all term arrearages so alleged to be due from *Walker*: that the clerk to the town agents afterwards attended to pass the same fine through the office, and told the officer, that he was willing to pay the usual fees for passing it, as well as any termages that might be owing by his employers, but that he was informed no termages were due from them, and that it was on the ground that *Walker* the elder was indebted to the office for termages during twenty-six years and one Term, that the warrant of attorney was not filed.

Mr. Serjeant *Lens* now shewed cause, on an affidavit made by the deputy clerk of the warrants, which stated, that *Walker* the elder was admitted an attorney of this Court, in 1796, and that his termage fees up to and including *Hilary* Term, 1797, only had been paid: that the deputy considered that he was fully justified in refusing to file the warrant of attorney in this case, until the whole of the termage fees due had been paid, as he had always understood such to have been the ancient right and usage of the office; and had been the constant and invariable practice during the period he had been there for upwards of twenty-five years: that this right was recognized in a document preserved in the office, and purporting to have been an answer given in the year 1783 by Mr. *Eyre*, the then clerk of the warrants; to certain complaints made to the then commission-

ers, appointed to take a survey of the Courts of Justice of *England and Wales*, and to enquire into their fees, from which the following is an extract.

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“Complaint. This office insists upon 8*d.* every Term from all attornies, or else their clients’ business is stopped: till about twenty-five years ago it was but 4*d.*

“Answer. One 4*d.* has been paid by the attornies to the clerk for many years, and it is reported in the 15th *Car. 1.*, to the then commissioners, to have been paid in the 11th *Edw.* and the clerk has paid an immemorial composition of 11*l.* 1*s.* 4*d.* every Term, to the three *præsid.* Judges, in lieu of this money collected: the other 4*d.* is collected by an order of Court in *Easter* Term, 10 *Wil. 8.* 1698, for the use of the four criers of the Court, and is paid to them every Term: this order directs that the fee of 4*d.* shall be demanded from every attorney every Term, at the time of filing their warrants, or signing their attachments, &c.”

The deponent then stated, that he had not been able to find the order of Court referred to in the above answer, which was stated to have been in the office for many years; but that the ancient practice, and that which followed it, was recognized by a rule of Court made in *Easter* Term, 31 *Geo. 2* (1757) (a).

(a) By which, after reciting, that by the ancient custom, and several rules of the Court of *Common Pleas*, every attorney ought to pay to the clerk of the warrants, or his deputy, his termage fees, (being 8*d.* a Term) for the use of the said clerk of the warrants and the criers of that Court, at the end of *Trinity* Term, or before the first day of *Michaelmas* Term in every year; and that complaints had been made to the Court by such clerk and criers, that of late such payments had been greatly neglected, and that several attornies who were in arrear for their termage, in order to avoid the payment thereof, had practised in the names of other attornies who were not in arrear, but had duly paid their termage; and that there was then a very considerable sum of money due from the attornies for such termage. For remedy thereof, and that the said clerk of the warrants, and criers, might not be deprived of their just and legal fees,—it was ordered that “every attorney of this Court should pay and

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The learned Serjeant submitted, that this affidavit was a complete answer to the application, and that by the ancient and continued practice of the Court, the clerk of the warrants was justified in refusing to permit a fine to pass through his office, until the fees in question were paid. It must be observed, that neither the clerk nor the deputy exercising these offices, have the slightest degree of interest in those fees, which are of so trifling a nature, that they can only be enforced by the mode the officer has adopted in the present instance. Although the rule 31 Geo. 2, does not in terms authorize the officer to stop the passing of a fine, still, it recites the ancient custom of the payment of termage fees to the clerk of the warrants; and that several attornies who were in arrear for their termages, in order to avoid the payment thereof, had practised in the names of others who were not in arrear: and, as *Walker's* termages had been due ever since the year 1797, it may fairly be inferred, that he has not applied to have his warrants filed since; but that he has infringed on the rule of Court, by practising in the name of others who were not in arrear. Besides, the present application was not made by *Walker* himself, but by his agents in town, and when the officer discovered that *Walker* was the person actually employed and concerned in passing the fine, he was justified in not allowing it to be perfected until such arrearages were paid. It may perhaps be said, that this is a hardship imposed on the parties to the fine, but it was the duty of the attorney whom they employed to conduct himself accord-

discharge all his arrears of termage to such clerk of the warrants, or his deputy, before the first day of *Michaelmas* Term then next; and afterwards should pay his said termage to the said clerk of the warrants, or his deputy, before the first day of *Michaelmas* Term, in every subsequent year."

J. WILLES.

E. CLIVE.

H. BATHURST.

W. NOEL.

ing to the rules of the Court of which he is a member. At the time they entrusted him, they committed themselves to his care, and he has so long evaded the payment of those fees which were due to the officer, that it would be too much to say, that the latter was not justified in acting as he did, when, by the universal practice and rules of the Court, he was entitled to receive such termages each year, at the time of filing the warrants of attorney; and if the parties to this fine have received an injury, owing to the misconduct of their attorney, it is clear that they may have their remedy as against him.

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Mr. Serjeant *Pell* in support of the rule.—Even if the fees in question are established by law and rule of Court, it does not follow, that the officer entitled to receive them, can prevent a fine from being passed without their being first paid. Such a principle cannot be substantiated by practice; nor is there any rule of Court which expresses, even in the most distant terms, that the business of a suitor shall be stopped, until the termage fees due from his attorney be paid by him to the clerk of the warrants, who is entitled to receive them. If this were so, the officer might remain dormant for any number of years, and make no demand on the attorney; can it therefore be said, that if a client instructs an attorney to perfect a fine which he fully expects to be completed without delay, that such fine can be stopped in the office, because the officer has a claim on such attorney. It has been urged, however, not only that the practice has been uniform, but confirmed by the rule 31 *Geo. 2*. No such confirmation however is therein expressed, and it cannot be supplied by inference that the business entrusted to an attorney by his client can be impeded or delayed, nor did the Judges who framed the rule intend any such construction to be put upon it: for it merely directs, that every attorney of the Court shall pay his arrears

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of termage, to the clerk of the warrants, or his deputy, before the first day of *Michaelmas* Term in every year. In this case, it is sworn, that an offer was made to pay the usual fees for passing the fine, as well as any termages which might be due from the agents who were employed to pass it. If the officer had demanded one year's termages, as being due from *Walker*, it might have been perhaps reasonable, and as every attorney is, by the rule, expressly ordered to pay his termages to the officer every year, the latter might have compelled him to do so, by an application to the Court; and need not commence an action for that purpose. The clerk of the warrants has, therefore, an immediate remedy, which is specifically given by that rule. It would have been unnecessary to have made it, if he had before the power of stopping an instrument of this description, until these fees were paid. It must be also observed that fines and recoveries are considered as instruments of the highest assurance in the law; and if the Court will allow their execution to be impeded, for the purpose of assisting their officer, it will tend in a great degree to prevent the alienation of real property, which is already much impeded by the strictness and technicalities required in documents of this nature. As, therefore, the practice as to the refusal to pass a fine until those fees are paid, is not confirmed by rule of Court; and as it is not expressed therein in what manner they are to be paid, but merely that they must be paid once in each year, no inference can be drawn, nor can it be collected from the terms of such rule, that the clerk of the warrants can refuse to perfect a fine, until the arrearages of an attorney are paid, and more particularly so, as such officer may have a direct and immediate remedy by an application to the Court.

Lord Chief Justice DALLAS.—It has been agreed that the fees in question are legal fees, and it has also been

admitted that the officer is, at some time or other, entitled to receive them. The question then is, whether, in the case of arrearages, he could seek to recover the termage fees due to him, according to the mode he has now adopted? As to their legality, they appear to be founded, not only on law, ancient usage, and practice, but by express orders of the Court. The present application is made by way of resistance to the right of the officer, to recover the arrearages of these fees. It appears that formerly their payment had been greatly neglected, and that several attorneys who were in arrear for their termages, in order to avoid the payment thereof, had practised secretly in the names of others who were not in arrear. This, it appears, was afterwards brought before the Court in the shape of a complaint. An attorney is an officer of the Court, and if he acts improperly is subject to their censure and control. A rule of Court was afterwards made, by which those arrearages were ordered to be paid at or before a certain day therein expressed. The legality of the fees is thereby admitted. It is equally clear, that in the present case the officer has acted conformably to ancient usage, as well as modern practice, as he states that he has been in the habit of so doing for the last twenty-five years. The order of 31 Geo. 2, refers in terms to the ancient custom of the Court, and recites, that the payment of termage fees was attempted to be avoided by connivance; and it also appears, that those payments were founded as well on several rules of this Court, as upon such ancient usage. The order then, after reciting, that there was a very considerable sum due from the attorneys for termage, and that the clerk of the warrants and criers might not be deprived of their just and legal fees, directed that every attorney of this Court should pay and discharge all his arrears of termage to the clerk of the warrants or his deputy, before the first day of *Michaëmas* Term then next, and

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should afterwards pay such termage before the first day of that term in every subsequent year. If an attorney refused to pay his arrears pursuant to that order, the Court would not permit him to practise as such. In principle, therefore, it appears to me, that the order directly applies to the present question, and also that it operates prospectively. No culpable omission has been attempted to be imputed to the officer, for not having demanded those fees before, and I am therefore of opinion that his right to them is established by practice, and this rule must be consequently discharged.

Mr. Justice PARK.—I am of the same opinion. When this application was made, I was not aware of the rule of Court of the 31 Geo. 2, and at first thought that the present demand might have been in the nature of an extortion by the officer. But on looking at the order contained in that rule; it appears that it was made in consequence of several attorneys having misconducted themselves, and attempted to avoid the payment of their termage fees to the officer. It also appears, that there was a previous order of Court made in the reign of Will. 3, which has been since lost, and that it has been the constant and invariable practice for the officer to demand those fees from the time of Elizabeth, and which form part of his salary. In the last rule of Court, which was made sixty-six years since, and signed by Lord Chief Justice Willes and the three other Judges of this Court, it was stated by way of recital, that several attorneys had practised in the names of others, they being themselves in arrear for their termages. That looks as if their business might be stopped, and that the present mode for enforcing the payment of the arrearages might be adopted. Besides, it appears that the object of that rule was, that the officers might not be deprived of their just and legal fees. It has however been suggested by my Brother Pell, that it is the duty

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of the officer to demand and collect those termages every year; but it seems to me that this cannot be done. Is he to go to *Northumberland*, or any other distant county, and make an application for so trifling a sum as 2s. 6d. for a year's termages? The rule 31 Geo. 2, recognized the fact that arrears were then due from several attorneys; and directed, that in future, they should be paid before a given day in each year, viz. before the first day of every Michaelmas Term, as the time for such payment was before indefinite and uncertain. Although it may at first appear a hardship on a client, that his business may be stopped on account of the negligence or misconduct of his attorney in not having paid his termages to the officer of the Court; still, it must be considered that the sum demanded is extremely small, if taken with reference to each attorney individually, although it will amount to something considerable, when collected by the officer from all those who are liable to pay such termages; and if a party is injured through the misconduct of his attorney, he may either dismise him, or have his remedy against him. In the Court of Chancery, if an application be made by a solicitor to file a bill, the officer will not permit it to be done, until certain fees are paid by the person making such application.

Mr. Justice BURROUGH.—The principal ground on which I agree with my Lord Chief Justice, and my Brother *Park*, is, that it appears to me, that the officer has of necessity adopted the only course of proceeding for the recovery of the termages in arrear from Mr. *Walker*, by refusing to perfect the fine in question, until they were paid. No other mode could answer the purpose, except at an expense which would exceed their value; nor has he any other means to enforce such payment. It would be too much to say, that he must be driven to an action, and if he were to apply to the Court, the expenses of the motion and stamps would far exceed the amount of the fees he might seek

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to recover. The sum he claims, is owing to him for legal fees, and the rule 31 Geo. 2, points out the mode as to their payment, viz. that every attorney of the Court must pay and discharge all his arrears of termage before the first day of *Michaelmas* Term in every year, to entitle him to practise as such. Here too, the application is made by the agents in town against the officer, on his refusing to complete the fine, as he had discovered who their principal in the country was, and that he was in arrear for those termages. If the agents had paid those arrears, can there be any doubt but that they might have charged them in their bill to their client, and be entitled to recover from him, as it would not be in the nature of a voluntary payment. It therefore appears to me, to be an ungracious and improper application. It may also be observed, that until very lately, criminals who were acquitted on the circuits were detained by their bodies until they had discharged certain fees, which were abolished by a recent statute, and directed to be paid in another way.

Rule discharged.

Saturday,
June 7th.

WORLEY v. RYLAND.
Same v. OLIVER.

Where an affidavit to set aside a judgment of *non-pros* for irregularity, was entitled as being in two several causes against separate defendants, but written on one sheet of paper and with one stamp only:— Held to be insufficient.

MR. Serjeant *Onslow*, having obtained a rule nisi, to set aside a judgment of *non-pros* for irregularity; Mr. Serjeant *Pell* now took an objection to the affidavit on which the application was founded, as it was entitled in two causes, as above, but written on one sheet of paper, and had only one stamp.

The Court held the objection to be well founded, as, from the title, it appeared that there were two distinct causes of action, which might tend to mislead the defendants, as they might suppose that a separate motion was made in each cause; and they observed, that it was not like the

case of a sheriff, where an affidavit is entitled as *The King* against the sheriff of —, in a cause of *A. against B.*; as that is done for the purpose of informing the sheriff the names of the parties in the cause in which the action is commenced against him.

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WORLEY
in
IRELAND.

Rule discharged.

OTHER v. CALVERT.

Saturday,
June 7th.

THIS was an action of trespass for breaking and entering the plaintiff's closes, treading down grass, and destroying trees and shrubs therein, and breaking down the hedges and fences.

The declaration contained two counts: the first charged the trespasses to have been committed wilfully and maliciously, after notice; and the second was similar to the first, omitting the charge of wilfulness and malice. The defendant pleaded first not guilty, on which issue was joined. There were also ten special pleas: the first of which justified all the trespasses in the first count, under a public right of way; and the second justified all those in the second count, under a similar right; the third justified all the trespasses in the first count, under a private right of way; and the fourth those in the second count, under a similar right; the fifth justified under a private right of way, as to the closes specifically mentioned in the first named count of the declaration; the sixth justified as to those named in the second count, under a similar right; the seventh justified as to one of the closes named in the first count, under a private right of way; the eighth justified as to the same close mentioned in the second count, under a like right; the ninth justified as to another close, mentioned in the second count, under a private right of way, as in the eighth; and the tenth plea contained a justification as to another close mentioned in the second count of the declaration.

Where, in trespass *quare clausum fregit*, some issues are found for the plaintiff and others for the defendant, and the latter obtains a verdict on an issue which goes to the whole of the plaintiff's cause of action, he is entitled to the general costs of the cause, and the plaintiff to the costs of those issues only which are found for him, which extend only to the costs of the pleadings; the only exception being in an action of replevin where both parties may be considered as actors.

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The plaintiff, in his replication, traversed all the several rights of way, as set forth in those pleas, and newly assigned *extra viam*, and that the trespasses were committed for other purposes than the exercise of the respective private rights of way, and also for excess: the defendant joined issue on the several traverses, and pleaded not guilty to the new assignment, on which issue was also joined.

At the trial of the cause before Mr. Justice *Park*, at the Summer Assizes at York, 1820, the jury found a verdict for the plaintiff, on the general issue, as to all the trespasses justified, without damages; and for the plaintiff upon the fourth, fifth, sixth, seventh, tenth, and eleventh issues upon the several rights of way stated in the fourth, fifth, sixth, seventh, ninth, and tenth pleas; and for the defendant on the second and third issues as to a public right of way, and upon the new assignment; and the jury were discharged from giving any verdict upon the eighth and ninth issues.

On the taxation of costs before Mr. Prothonotary *Watlington*, he allowed the defendant the general costs in the cause, and the plaintiff the costs of the *pleadings* only on the issues found for him.

Mr Serjeant *Pell*, on the last day of the last Term, obtained a rule calling upon the defendant to shew cause why the Prothonotary should not review his taxation; and submitted that although the defendant was entitled to the general costs of the cause, yet that the plaintiff was entitled to all the costs of the issues found for him, which ought not to have been confined to the pleadings alone, but should have been allowed as to a proportionate part of the expenses incurred in preparing the briefs, and attendance of witnesses at the trial. The defendant should have been prepared to shew that the plaintiff had no ground of complaint whatever against him; and although he might have failed in his defence as to a public right of way, yet,

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as he justified under such right as well as a private right, it was incumbent on the plaintiff to prepare himself with evidence to rebut both; in which case it was necessary for him to be provided with two different sets of witnesses, by which a considerable and additional expense was necessarily incurred; and it was therefore not only reasonable but just that he should be completely indemnified as to all the costs of those issues which had been found for him as to the private right of way, as the defendant himself had put a false issue on the record in that respect. Previously to the statute 4 *Anne*, c. 16, only one plea could be pleaded, and Mr. Justice *Buller* in *Duberley v. Page* (a), observed that "the meaning of the legislature in passing that act was, that though they would grant an indulgence to a defendant, by permitting him to plead several pleas, yet it should not be prejudicial to the plaintiff: and therefore the costs of double pleadings were by the statute left in the discretion of the Court." And Mr. Justice *Grose* said, that (b) "the costs of bad pleading should fall on the person who was the cause of that pleading." That is the clear and rational construction of the statute; and here, as the plaintiff was improperly put to great expense in collecting evidence to disprove the issue as to the private right of way, which the defendant could not support, he is entitled to have those expenses deducted from the general costs of the cause, and more particularly so, as the learned Judge, before whom it was tried, has since refused to certify that the defendant had probable cause to plead such matters as were found against him, according to the provision contained in the 5th section of that statute (c).

(a) 2 Term Rep. 394.

(b) *Id.* 395.

(c) By the 4th section it is enacted that "the defendant or tenant in any action or suit, or any plaintiff in replevin, in any Court of record, may, with leave of the same Court, plead as many several matters thereto, as he shall think necessary for his defence:"—and by the 5th section it is provided, that "if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of

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Mr. Serjeant *Lens* was about to shew cause in the first instance, when Mr. Prothonotary *Watlington* stated, that it was admitted before him on the taxation, that the defendant was entitled to the general costs of the cause, as the issues found for him as to the public right of way went to the whole cause of action; that he had accordingly only allowed the plaintiff the costs of the pleadings on the issues found for him; and that although a defendant in replevin has been allowed the costs of the trial, witnesses, &c. on the issues found for him, as well as the costs of the pleadings, yet that such a case was an exception founded on the peculiar nature of that action, in which both parties are to be taken as actors, and are so treated by the Court(s).

Mr. Prothonotary *Ray* differed in opinion from Mr. Prothonotary *Watlington*, and observed that he had understood the practice to be, that, where the issues found for the plaintiff were material, he would be entitled to the costs of the trial; but that if they were immaterial, he would only be entitled to the costs of the pleadings on such issues.

The Court said, they would make further enquiry, although they then entertained very little doubt but that the taxation was perfectly correct, according to the cases of *Vivian v. Blake* (b), *Trotman v. Holder* (c), and *Benett v. Coster* (d).

Cur. ado. vult.

the Court; or, if a verdict shall be found, upon any issue in the said cause, for the plaintiff or demandant, costs shall be also given in like manner; unless the Judge, who tried the said issue, shall certify that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him."

(a) See *verba Gibbs*, C. J. in *Cook v. Green*, 1 Marsh. 236.—(b) 11 East, 263.—(c) *Ante*, Vol. III. 555.—(d) *Ante*, Vol. IV. 110; S. C. 1 Brod. & Bing. 465.

Mr. Justice PARKER now said, that he had spoken to nearly all the Judges on the subject, who were clearly of opinion, that the costs of the issues found for the plaintiff in this cause included only the costs of the pleadings on those issues. That this point had been fully considered in *Benett v. Coster*, where the Court felt themselves bound by the authority of *Varian v. Blake*, which established the principle that a plaintiff has in no case a right to costs, except where he is entitled to judgment on the whole record, and that where the defendant obtains a verdict on an issue to a plea which goes to the whole of the plaintiff's cause of action, the defendant is entitled to the general costs of the cause, and the plaintiff to the costs of those issues only which are found for him, and that the costs of those issues mean the costs of the pleadings only. The cases of *replevin* do not apply, as they form an exception to the general rule, which appears to have been universally adopted and properly exercised by the Prothonotary in this case. This rule therefore must be

Discharged.

(a) Lord Chief Justice Dallas was not in Court when the application was made.

THOMAS v. ANSCOMBE.

*Monday,
June 9th.*

MR. Serjeant *Vaughan* moved that the declaration in this cause might be referred to the Prothonotary, to strike out such counts as he might think unnecessary, on affidavits which stated that the action was brought on two bills of exchange; that the declaration contained a separate count on each, as well as all the money counts, together with a count for interest, which he submitted that the plaintiff would be entitled to without the introduction of such a count, and that it was therefore unnecessary and superfluous.

Where a declaration on two bills of exchange contained a count on each, as well as all the money counts, and a count for interest: the Court refused to strike out the latter as being unnecessary or superfluous.

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But the Court observed, that it had been remarked by Lord Kenyon and Lord Ellenborough, that motions of this description were frequently more vexatious than the matters complained of. That if the plaintiff failed on the counts on the bills, he might perhaps obtain a verdict either for money had and received, or on an account stated; and that it was not to be inferred that the jury would compute interest, as a matter of course.

The learned Serjeant therefore took nothing by his motion.

Tuesday,
June 10th.

REILLY v. JONES.

Where the plaintiff and defendant entered into articles of agreement, by which the former, in consideration of 2300*l.*, agreed to sell to the latter the lease of a public house, as he then held the same, for the expiration of his term therein, and also his goods, fixtures, and effects, at a valuation; and the defendant agreed to take an assignment of the lease, and pay the a-

THIS was an action of *assumpsit* on the following agreement:

"This agreement entered into this 2nd day of *August*, 1822, between *Michael Reilly* of *Oxford Street*, victualler, of the one part, and *Edward Jones*, of *Tothill-street*, of the other part—Witnesseth, that, in consideration of the sum of 2300*l.* the said *Michael Reilly* doth agree to sell unto the said *Edward Jones* the lease of the house and premises, situate, lying, and being the sign of the *Delaware Arms*, *Oxford Street*, aforesaid, as he holds the same, at the net annual rent of 75*l.* for the term of fourteen years and a half, from *Midsummer-day* last; also his goods, fixtures and effects, now on the said premises, and which he has a right to sell, at a fair valuation by two appraisers or their umpire. And his saleable stock in trade—Porter, not exceeding 12 butts; Ales, 30 barrels; Wines; foreign

above sum for it, as also the amount of the goods, fixtures, and effects, and take possession of the premises on a given day, when the plaintiff agreed to give up possession of the said premises, goods and effects, to assign licences, to repair or allow for all damaged outside windows, and to clear the rent and taxes to the day of quitting possession; and the expenses of the agreement were to be paid by the parties in equal moieties; and it was lastly agreed that on either party's not fulfilling all and every part of the agreement, he should pay to the other 500*l.* thereby settled and fixed as liquidated damages:—Held that this latter sum was not a mere penalty to cover such damages as might be actually incurred by the non-performance thereof, but that, on a breach by the defendant for refusing to accept an assignment of the lease, or take possession; he was liable to pay the plaintiff the full amount of that sum.

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and British spirits and compounds, 150*l.*; to be valued by proper gaugers, or their umpire; and the said *Edward Jones* doth agree to take an assignment of the said lease and premises as above described without requiring the lessor's title, and that he will pay unto the said *Michael Reilly* the sum of 2300*l.* for the said lease, deducting the deposit of 50*l.* now paid; also the amount of goods, fixtures, effects, and stock as aforesaid, together with the amount of the unexpired term of the licences, and take possession of the said house and premises on or before the 29th day of *September* next, at which time, and upon payment thereof, he the said *Michael Reilly* doth agree to deliver up possession of all the said premises, and also the effects and stock, to assign over good and sufficient licences, to repair or allow for all damaged outside windows, and to clear the rent, taxes, and outgoings, to the day of quitting possession. And lastly, it is hereby mutually agreed, that all law and other expenses of carrying this agreement into effect, shall be paid by the said parties in equal moieties, and that either of them not fulfilling all and every part, the party not fulfilling shall pay unto the other the sum of 500*l.* hereby settled and fixed as liquidated damages, the deposit now paid to be considered as part of the said damages in case of default made by the said *Edward Jones*, or returned in addition to the said damages in case of default being made by the said *Michael Reilly*. As witness our hands the day and year first above written.

Witness, *James Scriven,*
John Langdon.

M. Reilly,
E. Jones.

The declaration, after setting out the agreement, and stating mutual promises, averred that the plaintiff, at the time of making thereof, and from thence until and after the 29th *September* therein mentioned, was lawfully pos-

1822
Reverend
or
Justice:

started of the house and premises therein described, for the residue of a term, whereof fourteen years and a half were unexpired at *Midsummer-day*, 1822; and that during all that term he had full power to assign the lease and sell the premises for the residue of such term: that he was willing to have sold and delivered to the defendant all the goods, fixtures and effects on the premises at the time of making the agreement, at a fair valuation, as therein expressed, as well as his saleable stock in trade, and to have executed a proper assignment of the lease to the defendant, and delivered up the possession of the premises, fixtures, and stock, on the *29th September* next after the making the agreement, and assigned over good and sufficient licences, &c. and to have paid a moiety of the law and other expenses of carrying the agreement into effect; and to have performed all things therein contained on his part to be performed, fulfilled, and kept:—and assigned for breach, that the defendant did not nor would accept an assignment of the lease, nor take possession of the said house and premises, goods, fixtures, and effects, and stock in trade, or any of them, or any part thereof, on or before the *29th September* next after making the said agreement, but wholly refused so to do; and on the contrary thereof, on the *28th September*, 1822, gave notice to the plaintiff that he would not perform the agreement; that the defendant had not at any time since hitherto accepted an assignment of the lease and possession of the premises, or paid the consideration mentioned in the agreement, or any part thereof, or in any manner performed or fulfilled the same on his part, but had therein failed and made default; and that, although the said *29th September* is long since passed, the defendant has performed no part of the agreement; by reason whereof he became liable to pay the plaintiff the sum of 450*l.*, being the remainder or balance of the said sum of 500*l.* in the agreement mentioned, and thereby agreed upon as fixed and liquidated damages, to be paid by the party not ful-

filling the said agreement, after deducting and allowing the said sum of 50*l.*, paid as a deposit, when the defendant should be thereto afterwards requested. The second count was in more general terms, to which were added the common money counts; and the defendant pleaded the general issue.

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At the trial before Mr. Justice *Park*, at *Westminster*, at the Sittings after *Michaelmas Term*, 1822, the execution of the agreement was proved, and a letter, written by the defendant, was given in evidence; in which he declined the purchase, and stated that he would not take possession of the premises. It also appeared that the plaintiff, in the month of *November* following the date of the agreement, had re-sold his interest in the premises for 2,200*l.*, being 100 less than the amount which was to have been paid by the defendant, and that the purchaser had taken possession accordingly. The jury found a verdict for the plaintiff, damages 50*l.*, which, together with the sum deposited by the defendant at the time of making the agreement, would amount to the loss the plaintiff had actually sustained on the re-sale; but liberty was given the plaintiff to move that the verdict might be increased to 450*l.*, if the Court should be of opinion that the sum of 500*l.* mentioned in the agreement was to be considered in the nature of liquidated damages.

Mr. Serjeant *Vaughan* having, in the last *Hilary Term*, accordingly obtained a rule *nisi*, that the verdict found by the jury might be increased from 50*l.* to 450*l.*, being the balance of the liquidated sum of 500*l.*, for which this action was brought:—

Mr. Serjeant *Lens* and Mr. Serjeant *Lawes* now showed cause, and submitted, that on looking at the nature and tenor of the agreement, and taking it altogether, the sum

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of 500*l.*, although stated therein as liquidated damages, must be considered as a penalty, and consequently, that in legal effect the plaintiff would only be entitled to recover such damages as he had actually sustained by the default of the defendant, in not taking possession of the premises, and which had been properly estimated by the jury at the trial. The agreement contains different articles and provisions to be performed by the parties which are wholly independent of each other; and the terms are, that if either of the parties does not fulfil all and every part of the agreement, he shall pay the other 500*l.* thereby settled and fixed as liquidated damages; and according to the actual import of those terms, a failure in performance of any part of the agreement, however trifling, would subject the party not fulfilling it to the payment of that sum; but it could not be the intention of the parties, that if the plaintiff had failed to perform a minor point, as if he had neglected to repair; or allow for the damaged outside windows, or to clear the rent, taxes, or outgoing, to the day of quitting possession, that he should be liable for such neglect to pay 500*l.* to the defendant; or that either party should be liable to pay the other to that extent, for the non-payment of the moiety of the law and other expenses for carrying the agreement into effect. This case, however, must be governed by that of *Astley v. Weldon* (a), where the plaintiff agreed to pay the defendant a certain sum per week to perform at his theatres, together with her travelling expenses, &c.; and the defendant agreed to perform at the theatres such things as she should be required by the plaintiff, and attend at the theatres beyond the usual hours on any emergency, or be subject to certain fines; and it was agreed by both parties, that, "either of them neglecting to perform the agreement, should pay to the other 200*l.*;" and it was held that that sum was in the nature of a penalty, and not of liquidated damages; and Mr.

(a) 2 Bos. & Pul. 345.

Justice *Heath* there stated, that (a), "it might be laid down as a general principle, that where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty: but that, where it is agreed, that if a party do such a particular thing, such a sum shall be paid by him; there the sum stated may be treated as liquidated damages." So here, as the agreement was entered into as a security for the performance of several and independent acts, some of which were less important than others, that distinction is precisely applicable; and if the rule were otherwise, a party might be called on to pay the whole sum for a breach of the most trivial of the provisions contained in such agreement; and the term "liquidated damages" will not alter the case, as it is not in the nature of a penalty for the due performance of the whole of the agreement, or of a single act therein contained. This case, therefore, falls expressly within the substance and meaning of *Astley v. Weldon*. Although in *Barton v. Glover* (b), where the parties entered into an agreement, that, in consideration that the plaintiff would pay the defendant 175*l.*, the latter would withdraw his stage-coach from the road from *Croydon* to *London*, and not engage himself in driving any other stage-coach thereon; and for the due performance of the agreement, each of the parties agreed to bind himself to the other in 500*l.*, to be considered and taken as liquidated damages, or sum of money forfeited or due from the one party to the other, who should neglect or refuse to perform his part of the agreement. Lord Chief Justice *Gibbs* was of opinion, that unless the damages were to be considered as liquidated, and definitively ascertained by the parties themselves, the clause in the agreement could mean nothing:—yet, there the agreement was confined to the performance of one thing only, viz. the defendant's with-

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(a) 2 Bos. & Pul. 353.—(b) Holt's N. P. C. 43.

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drawing his coach from the road. Here, however, the parties stipulated for the performance of several acts; some of which were of a most trivial description, and the only actual loss the plaintiff has sustained was clearly ascertained to have been by the deficiency on the re-sale of the premises. So, in *Lowe v. Peers* (a), the agreement was confined to one act alone, viz. a contract by the defendant to marry the plaintiff; and he undertook, that if he should marry any one else, he would pay her 1000*l.*, within three months next after such marriage, and as the precise sum was there fixed and agreed upon between the parties as a compensation in damages for a breach of the promise, and not by way of penalty or liquidated damages, that sum was the ascertained damage, and to which the jury were confined, on its being proved that the defendant had married another woman. In *Rolfe v. Peterson* (b), where the lessee covenanted to pay an increased rent for ploughing up meadow ground, and converting it into tillage, it was considered in equity as a liquidated satisfaction, as it was only an agreement to pay a larger sum for using the land in a particular way, and was therefore not in the nature of a penalty. And in *Fletcher v. Dyche* (c), where two persons agreed to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and the work was not finished in time, it was most properly determined that the weekly payments were not to be considered by way of penalty, but in the nature of liquidated damages. But all these cases are distinguishable from the present, as they applied only to the performance and breach of one particular act, and which cannot operate in a case of mere partial default. If parties stipulate for liquidated damages, there must be a reciprocity on each side; and if the damages in this case are considered as liquidated, it would

(a) 4 Burr. 2229.—(b) 6 Brown, Parl. Cas. 470.—(c) 2 Term

produce infinite injustice; whereas, if they are construed as a penalty, it will carry into effect the intention of the parties, by analogy to the statute 8 & 9 Will 3, enabling a plaintiff to assign several breaches in an action on a bond conditioned in a penalty for the performance of several things. So, where a sum of money, whether in the name of a penalty or otherwise, is introduced into a covenant or agreement, for the mere purpose of securing the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the contract, and the penalty only as accessory, and therefore, only to secure the damage actually incurred.

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Lord Chief Justice DALLAS. — The only question in this case, turns on the construction to be put on the words of the whole of the agreement, which has been entered into between the plaintiff and defendant, from which I think, that it may fairly be collected, that the intent of the parties was, that the damages stipulated for as between themselves, were to be considered as liquidated damages, and cannot be treated as a penalty, although they might operate as such in a popular sense; but the parties have expressly agreed between themselves, that they should be settled and fixed as liquidated damages. This case, therefore, is altogether distinguishable from that of *Atley v. Weldon*, as well as the others which have been cited in the course of the argument. There, as well as in *Fletcher v. Byche*, the agreement was for the payment of small sums at stipulated times, but here the agreement was entered into for the performance of covenants of an extensive nature, and the gross sum for the breach of it by either of the parties was fixed at 500*l.*, by way of *liquidated damages*; and no case can be found, where these words have been introduced that they might be passed over, and considered by the Court in the nature of a penalty. I wish to, avoid founding any opinion on any antecedent decisions, but to confine myself entirely to the terms of the agree-

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ment taken altogether, from which it appears to me to be perfectly clear, that the damages in question must be considered as liquidated damages, and not a penalty.

Mr. Justice PARK.—I am of opinion, that the plaintiff is entitled to recover the sum of 500*l.* for which this action was brought. There is no statement of special damage either in the agreement or declaration, nor has any case been pointed out or adverted to, where, after the parties themselves have used and adopted the words "*liquidated damages*," that it has been holden, that the plaintiff should not recover the sum actually named and fixed as such damages in an action founded on the breach of the agreement. But it appears to me to be unnecessary to say that there is no such case, as on looking at the terms of the agreement itself, on which alone I found my opinion, I think there can be no doubt as to the intention of the parties. I fully concur with the principle stated by Mr. Justice Heath in *Astley v. Weldon*, that "where articles contain covenants for the performance of several things, and one large sum is stated at the end to be paid upon breach of performance, it must be considered as a penalty." There, however, the agreement did not contain the words which are to be found in this case, nor was there any expression therein, amounting or even equivalent to "*liquidated damages*;" but merely that it was agreed, that if either of the parties should neglect to perform the agreement, he should pay to the other 200*l.* to be recovered in any of his Majesty's Courts of record at *Westminster*, without stating the mode by which the same was to be recovered. Here, however, the parties have fixed on certain words, which express how the sum of 500*l.* was to be taken and settled; and in *Astley v. Weldon*, Lord Eldon lamented the numerous cases on this subject, and felt himself embarrassed in ascertaining the principle on which they were founded. It does not appear to me, that the agreement in this case must be assumed to be for the performance of several things;

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and although the fixtures and stock in trade were therein specified, and were to be valued and paid for independently of the sale of the premises, yet the substance of the agreement tended to one single act, namely, the relinquishment of the whole of the premises by the vendor to the vendee, who was to enter and take possession of the house, as well as the fixtures and stock in trade that might be found therein at the time of the assignment. The clause at the end of the agreement seems to me to be expressed in the strongest possible terms to shew the intent and meaning of the parties; and all the decisions concur in laying it down, that such intention must prevail: and where parties have expressly stipulated, not only that either of them not fulfilling all and every part of the agreement shall pay the other 500*l.* thereby settled and fixed as liquidated damages; but that the deposit then paid (and which was fixed at 50*l.*) was to be considered as part of the damages in case of default made by the defendant, or returned in addition to the damages of 500*l.* in case of default being made by the plaintiff;—it appears to me to be impossible to say, that both parties did not intend that the latter sum should be considered to be settled and fixed as liquidated damages.

Mr. Justice BURROUGH.—The stipulation between the parties as to whether the damages are to be considered as liquidated or not, appears to me, not only to take this case out of the decision of the Court, in *Astley v. Weldon*, but to be express in terms, and binding on either, to the amount of 500*l.*, who should be guilty of a breach of the agreement. The plaintiff wished to retire from business altogether: and there is no case which has decided that where the words “liquidated damages” have been used by the parties themselves, the Court will construe them to be a penalty. There is nothing to prevent an agreement of this description; and the parties have clearly and manifestly expressed their intent, that a certain sum should be fixed as li-

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quidated damages. If they were merely nominal, the defendant might have obtained relief in equity, but the intention of the parties must prevail. As to the statute of *William*, it operates only in cases of an actual penalty or penal sums, and was passed for the purpose of relieving plaintiffs, who previously could only recover their debts at law, by enabling them to assign more breaches than one, which, according to the common law, they could not have done; and if they failed, they lost their remedy altogether. Here, however, the sum mentioned in the agreement cannot be considered as a penalty or penal sum, as the parties themselves have expressly declared their intention to the contrary.

Rule absolute (a).

(a) See *Harrison v. Wright*, 13 East, 343.

Tuesday,
 June 10th.

THOMPSON v. MASHITER and Others.

Goods sent by the owner to his factor for sale, and deposited by the latter in a warehouse belonging to a public wharf, at a weekly rent, until such sale could be effected, are not liable to be distrained for rent due from the wharfinger to his landlord in respect of the wharf and warehouse.

THIS was an action of trover, brought by the plaintiff, to recover from the defendants the value of three tons and a half of whalebone. Plea—Not guilty. The cause came on for trial before Mr. Justice *Park*, at *Guildhall*, at the sittings after the last *Hilary* Term, upon the following admissions:—That the defendants were the landlords of a wharf, warehouse, and premises in *Saint Katharines*, near the *Tower*, late in the occupation of one *William Ramsey*, as tenant to them. That on the 7th *March*, 1818, the sum of 194*l.* 10*s.* was due from *Ramsey* to the defendants, for rent in arrear, in respect of the said premises, at the time of the distress and taking the whalebone, for which this action was brought. That the defendants caused a distress to be made for such rent, and that 3 tons, 5 cwt. and 17lbs. of whalebone were seized under it, which was regularly con-

demned, and sold after the 11th *March*, 1818, for 195*l.* 9*s.* and the proceeds applied by them in discharge of the rent in arrear. That the wharf in question was used by *Ramsey* as a public waterside wharf, and that he had warehouses over the wharf, where he used to receive goods at a rent. That the whalebone in question, with about 6 tons more, came into the possession of *Ramsey*, and was deposited in his warehouse in *December*, 1816, in the name of *Stephen Cleasby*, as the plaintiff's factor or agent; that it was kept there, paying a weekly rent for warehouse room, at 6*d.* per ton per week; that it continued there in *Cleasby's* name until the 2nd *January*, 1818, on which day it was transferred into the names of *Devereux* and *Lambert*, as the plaintiff's factors. That the whalebone belonged to the plaintiff, and was with his knowledge and consent deposited with *Ramsey*; and that on its being distrained, notice was given to the defendants that it was the property of and belonged to the plaintiff.—*Cleasby* the broker, proved that the whalebone was originally consigned to him by the plaintiff for sale on his account. That he deposited it at *Ramsey's* wharf for that purpose, that it was a public wharf, at which goods were publicly loaded, and which were usually put in the warehouses belonging to it, where they remained until sold, or otherwise disposed of: and *Devereux* stated that he was an agent or factor, and had the plaintiff's goods from *Cleasby*, in *January*, 1818, and was directed to hold them for sale on the plaintiff's account; and that they were distrained in the month of *March* following, for rent due from *Ramsey* to the defendants.—For the plaintiff, it was contended, that the whalebone was not subject to such distress, on the principle laid down in the case of *Gilman v. Elton* (a), viz. that goods of a principal in the hands of his factor for sale, are privileged from distress for rent due from the factor to his landlord; and it was submitted,

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(a) *Ante*, Vol. VI. 243. S. C. 3 Brod. & Bing. 75.

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that goods in the hands of a wharfinger were equally protected.—For the defendants, the case of *Francis v. Wyatt* (a) was relied on.—The learned Judge observed, that the question was, whether the whalebone, being in the custody of a warehouseman at a weekly rent, was privileged from distress for rent due from him to his landlords, it not being the warehouse of the factor; and he directed the jury to find a verdict for the plaintiff, with leave for the defendants to move that a nonsuit might be entered, or the facts turned into a special case, as the Court might direct: they gave a verdict accordingly, damages 227*l.* 10*s.* being the value of the whalebone at the time of the conversion and sale.

Mr. Serjeant *Lawes* having in the last Term obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered:—

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Taddy* now shewed cause, and submitted, that the exception established in *Gisbourn v. Hurst* (b), “that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or *managed* in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent,” extends to this case; and more particularly so, as it was recognized and adopted by Lord Chief Justice *Dallas* and the whole Court, in *Gilman v. Elton* (c), and held to apply to goods placed in the hands of a factor for sale, which were privileged from distress, on the grounds that they were deposited with him in furtherance of commerce, and public convenience. The same reasons apply to the case of a wharfinger, who, in this sense, must be considered as standing in the situation of a factor; and if so, the necessity of trade equally applies, and the custody of the one

(a) 3 Barr. 1498.—(b) 1 Salk. 250.—(c) *Ants*, Vol. VI, 252, 5, 7, 8.

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must be taken as the custody of the other. The whalebone was deposited in the warehouse of the wharfinger; and he held it on account of the factor, who alone was to exercise a discretion as to its removal or sale, and who paid a weekly rent to the wharfinger as long as it might remain in his custody. A factor or agent is not bound to have a warehouse of his own, and the article in question was consigned by the plaintiff to a factor to be managed and dealt with, and brought into the market for sale; and the wharfinger, or warehouseman, was employed or entrusted by such factor, as his agent or servant, to take care of it until such sale should be effected; and it is not necessary that it should be in the actual custody of the factor to that time. In *Francis v. Wyatt*, it was stated in argument that (a) "goods on a wharf, or at a warehouse for exportation, were privileged from distress for the sake of public trade and utility," and that position was not objected to by the opposite counsel, or contradicted by the Court. Whether the wharf had been private or public, the plaintiff's goods would have been equally protected, on the principle laid down in *Rede v. Burley* (b); where yarn was sent to a neighbour's beam to be weighed:—or a horse in a hostry, or sacks of corn or meal in a mill or market, all of which are held to be privileged from distress for rent, on the grounds of trade and public convenience (c). Here, however, it is admitted that the wharf was a public wharf, and the whalebone must be considered as in the hands or custody of the plaintiff's factor until sale; and if not, it was protected, even if it can be deemed to be in the custody of the wharfinger, as it was deposited with him for the purpose and benefit of trade.

Mr. Serjeant *Laves* in support of the rule.—The case of *Gilman v. Elton*, is mainly distinguishable from the pre-

(a) 3 Barr. 1502.—(b) Cro. Eliz. 596.—(c) Co. Lit. 47 a.

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sent, as there the goods were in the possession and on the premises of the factor himself, on whom the landlord had distrained for rent due from him as his tenant. Here, however, they were in the possession of a wharfinger, who is a person of a wholly different character; and the principle on which *Gilman v. Elton* was decided, was expressly confined to the case of a factor. Here it is admitted, that the whalebone in question belonged to the plaintiff, and was deposited with *Ramsey*, with his knowledge and consent; and not to be carried, wrought, or managed by him, but to remain at a certain weekly rent, until sold, or ultimately disposed of. Although the case of a wharfinger has been put, on the authority of *Francis v. Wyatt*, yet there the illustration was confined to goods on a wharf for exportation, and not lying there for the purpose of sale. Besides, here, the goods were in the hands of *Ramsey* as a warehouseman rather than a wharfinger, on whom no management devolved, and who was liable to the defendants for the rent of such warehouse; and as the plaintiff consented to the consignment to him, he must have been aware of his liability to his landlords. All the cases where goods on the premises have been held privileged from distress, are those, where they have been left with a bailee, for the purpose of being wrought on, or managed; whilst here, the factor alone had the power of disposition or sale, and the wharfinger or warehouseman had no control over the whalebone, except for the mere purpose of safe custody; and if it were held not to be distrainable, it is impossible to say to what an extent a privilege of this nature may be carried.

Lord Chief Justice DALLAS.—I am of opinion that in this case the plaintiff's goods were not liable to be distrained. It has not been contended in the course of the argument, that they would not have been protected, if

they had been sent immediately by the owner to the wharfinger, and had remained in his custody as such. It may, therefore, be assumed, on grounds of public policy and convenience, as well as for the benefit of trade, that goods, so deposited on a wharf, would be protected from a distress made by the landlord on the wharfinger, for rent due from him as his tenant. If it were necessary to go further, and consider, whether the warehouse was taken *pro tempore*, or not; yet, as it was a warehouse, the goods must be taken to be in the possession of the factor for a temporary purpose, and deposited there accordingly:—and whether he took them into his own warehouse, or actual custody, or whether he paid a rent for a warehouse, hired for the purpose of the deposit, appears to me to make no difference in the case. Besides, the factor was the agent or servant of the owner of the goods, and as such, deposited them in *Ramsey's* warehouse, on account of his principal; so that in point of fact, the case is the same as if the owner himself had immediately sent them there. It is true that in *Gilman v. Elton*, I confined my observations to the case of a factor, as I then thought a wharfinger or warehouseman might be distinguishable; but here the goods were originally consigned by the plaintiff to a factor, to be dealt with in the course of trade; he was therefore to be considered as the agent of the owner to sell, and he accordingly caused them to be deposited in a warehouse, on a public wharf, until such sale could be effected. But on the broader ground, that goods deposited with a wharfinger are protected for the benefit of trade and public convenience, during the time they remain in his custody as such, I am of opinion that the warehouse in question was not liable to be distrained by the defendants.

Mr. Justice PARK.—The doctrine and principle laid down in the case of *Gilman v. Elton*, where all the previous decisions on this subject were fully discussed and con-

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sidered by the Court, are particularly applicable to the present. It is unnecessary to specify any particular species of trade, where goods may be protected; as the general principle extends to the exemption from distress, not on account of the character of the individual in whose hands they are deposited, but for the benefit of trade, which alone is to be considered, and for which only such goods are by law to be favoured or protected. To this general ground I shall now confine myself, and therefore think it unnecessary to touch on any distinction as to whether *Ramsay* might be considered as the servant, or stood in the place of the factor.—Although the instances put by Lord *Coke*, with regard to exceptions from distress as to trade (a), do not apply in terms, yet they are strongly illustrative of the principle by which the present case must be governed and decided. So the facts and circumstances of the case of *Gisbourn v. Hurst* bear strongly on this, as well as the rule there laid down by Lord Chief Justice *Holt* and the whole Court, viz. “that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent:” and even in the case of a private engagement it was there resolved, “that any man undertaking for hire, to carry the goods of all persons indifferently, was, as to this privilege, a common carrier; for that the law has given the privilege in respect of the trader, and not in respect of the carrier; and that the case of *Rede v. Burley* was stronger, where two tradesmen brought their wool to a neighbour’s beam, which he kept for his private use, and it was held, that it could not be distrained.” On the general principle, therefore, that the whalebone in question was not distrainable, but ought to be protected for the benefit of trade, I am of opinion that the verdict found by the jury ought not to be disturbed

Mr. Justice BURROUGH.—The case of *Gisbourn v. Hurst* appears to me to be precisely in point, as the whalebone in question was landed at the wharf according to the course of trade, and was only to remain there until it was sold: I am therefore of opinion that it ought to be protected.

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Lord Chief Justice *Dallas* added, that this very case was put by counsel in argument in the case of *Francis v. Wyatt* and not denied or contradicted by the adverse counsel, or the Court. It may therefore be fairly inferred that goods on a wharf were there considered as protected from distress.

Rule discharged.

BRIX v. BRAHAM.

Tuesday,
June 10th.

THIS was an action of *assumpsit* on a bill of exchange for 54*l.*, drawn by one *Moore*, upon, and accepted by *Lovell*, and indorsed by the defendant to the plaintiff. The declaration contained a count on the bill, as well as counts for goods sold and delivered, and the usual money counts. The defendant pleaded, *First*, the general issue; *Secondly*, the statute of limitations; and *Lastly*, his bankruptcy and certificate; on which issue was joined. At the trial of the cause, before Lord Chief Justice *Dallas*, at *Westminster*, at the Sittings after the last *Hilary* Term, it appeared that the plaintiff and defendant had dealings together in 1813, when the former sold goods to the latter, to the amount of 80*l.* That the defendant became bankrupt in 1815, when a commission was sued out against him, but under which the plaintiff did not prove his debt; and that the defendant obtained his certificate in *July*, 1820. That the defendant, af-

Where a bankrupt, after the issuing a commission against him, but before obtaining his certificate, promised a creditor who had not proved under the commission, to pay him the whole of his demand, notwithstanding the bankruptcy, and indorsed a bill of exchange to him for that purpose:—

Held, that the certificate was no bar to an action brought on the bill, the debt due

before the bankruptcy being a good consideration for the promise, and which would have been available, even if made after the certificate had been obtained.

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ter the issuing of the commission, but before obtaining his certificate, told the plaintiff that he should not lose one farthing, but receive the whole of his demand, notwithstanding the bankruptcy, and indorsed to him the bill in question, which became due in *March*, 1819. On these facts being proved, his Lordship directed a nonsuit, reserving to the plaintiff liberty to move to set it aside, and have a verdict entered for him for 54*l.*, the amount of the bill.

Mr. Serjeant *Vaughan* in the last Term, obtained a rule *nisi* to that effect, and relied on the case of *Roberts v. Morgan* (a), where it was held, that a promise of payment made by a bankrupt to a creditor, before he had obtained his certificate, is sufficient to revive the debt, and is not destroyed by the certificate obtained afterwards. There, the bankrupt told a creditor under a former commission, that he should not suffer; so here, the defendant not only did so, but gave the bill as a security for that purpose. The new promise created a new debt, on which an action could be maintained, although the original consideration for the plaintiff's demand might have been proveable under the commission, and consequently barred by the certificate.

Mr. Serjeant *Cross* now shewed cause. Although in *Trueman v. Fenton* (b) it was held, that a bankrupt, after a commission of bankruptcy sued out against him, might, in consideration of a debt due before the bankruptcy, and for which the creditor agreed to accept no dividend or benefit under the commission, make such creditor a satisfaction in part, or for the whole of his debt, by a new undertaking or agreement, yet that case is distinguishable from the present; as there, the bankrupt accepted a bill of exchange, in satisfaction and discharge of two other accept-

(a) 2 Esp. N. P. C. 736,

(b) Cowp. 544.

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ances given by him to the plaintiff, previously to the bankruptcy. There was, therefore, an entirely new consideration, and a new contract, whilst here there was no new contract, as the bill was indorsed by the defendant to the plaintiff, in part consideration of the old debt, which being due previously to the bankruptcy, was proveable under the commission, and consequently barred by the certificate. Although, however, it may be here said, that the promise, after the bankruptcy, coupled with the indorsement of the bill, might constitute a new contract; yet, if that contract be looked at *per se*, it must be considered as a *nudum pactum*, as it was not founded on a new consideration; and if so, the present action cannot be sustained. In *Birch v. Sharland (a)*, where a defendant was in execution at the suit of the plaintiff, and a commission of bankruptcy issued against him, and he was declared a bankrupt, and soon afterwards, in order to regain his liberty, he gave the plaintiff a bond and warrant of attorney to confess judgment for the old debt, and the defendant afterwards obtained his certificate; it was held to be no bar, because the bond and warrant of attorney were given in order to procure the defendant's liberty; which was considered by the Court to be in the nature of a new debt, arising upon a new consideration, and that the old debt was thereby extinguished. Here, however, there was no express promise by the defendant to pay the debt due to the plaintiff before the commission was sued out, but only a declaration of his intention that he should not suffer; and it cannot be said that a new debt was created by the mere indorsement or transfer of a bill by the defendant to the plaintiff, after his bankruptcy; and if that had not been done, it is quite clear that there was no new consideration for the defendant's promise.

Lord Chief Justice DALLAS. — Although a bankrupt is

(a) 1 Term Rep. 715.

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 BRIX
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discharged by his certificate, from all debts due at the time of the commission, he may still make himself liable afterwards by a new promise. Here, the defendant not only promised in terms to pay the original debt after the commission was sued out against him, but indorsed the bill in question to the plaintiff, as a security for the payment of such debt; and although the defendant afterwards obtained his certificate, I am now of opinion that it is no bar to the promise made by the defendant after his bankruptcy.

Mr. Justice PARK. —The case of *Birch v. Sharland* appears to me to be applicable to the present, which the Court observed “was the same as if a new promise had been given for the same debt, upon the same consideration, even after a certificate obtained, which would operate as a new debt, because the old debt still remained in equity.” Here, the defendant not only promised the plaintiff that he should not lose one farthing, but indorsed the bill in question to him; and if he had done so, even after he had obtained his certificate, it might be made available against him, as the debt due before the bankruptcy was a good consideration for the promise and indorsement. In *Williams v. Dyde (a)*, which was an action of *assumpsit* for goods sold and delivered, and the defendant pleaded his discharge under a commission of bankruptcy, Lord *Kenyon* ruled, that the plaintiff was not obliged to declare specially, but might give the new promise in evidence.

Mr. Justice BURROUGH. —The only question is, whether there was any consideration for the indorsement of the bill by the defendant to the plaintiff, at the time it was made. As the old debt was not proved by the plaintiff under the commission, it remained in full force, and the subsequent promise was founded on a good consideration; and even if it had been made by the defendant, after the certificate had been ob-

(a) Peake's N. P. C, 69, 3d edit. 99.

tained, it would be founded on a consideration on which an action of *assumpsit* might be maintained. The original debt remained *in statu quo* and altogether unsatisfied. Besides, the indorsement of the bill must be considered as a new contract, and creating a new debt. The rule therefore for entering a verdict for the plaintiff for the amount of the bill must be made

Absolute.

1822.
Brix
v.
BRANHAM.

CROOK v. M'TAVISH.

Thursday,
June 12th.

THIS was an action of trespass.—The declaration stated that the defendant, on the 23d August, 1821, with force and arms, &c. seized and took a certain vessel of the plaintiff's, called the *Friendschap*, together with her cargo, tackle, and stores, of the value of 1500*l.* and which vessel was then bound on a voyage from *Leghorn* and *St. Maurice*, to *Amsterdam*, and kept and detained her, together with her cargo, tackle, &c. for six weeks, and damaged her cable, whereby the plaintiff sustained special damage. The defendant pleaded—Not guilty.

At the trial of the cause, before Lord Chief Baron *Richards*, at the *Summer Assizes*, at *Maidstone*, 1822, the plaintiff was nonsuited; but in the following *Michaelmas Term*, upon a motion made to the Court, a rule *nisi* was obtained to set aside such nonsuit and have a new trial.—On its coming on for argument in *Hilary Term* last, it was ordered that the following case should be stated for the opinion of

The 23d section of the statute 28 Geo. 3, c. 37, enacts, that if any action shall be brought against any person for any thing by him done in pursuance of any statute relating to His Majesty's Customs or Excise; it must be commenced within three months next after the matter or thing done. The 25th section enacts, that no writ shall be sued out against such person, until one calendar month next af-

ter notice in writing of such action shall have been delivered to him; and the 26th section enacts, that it shall be lawful for such person, at any time within one calendar month after such notice to tender amends to the person complaining:—Held, that an action brought against a revenue officer, under the 23d section of the statute, must be commenced within three lunar months next after the matter or thing done.

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By the statute 28 Geo. 3, c. 37, s. 23, it is enacted, that "if any action shall be brought against any person for anything by him done in pursuance of that, or any other act relating to His Majesty's revenues of Customs or Excise, such action shall be commenced within three months next after the matter or thing done." Where, therefore, an officer in the preventive service, boarded a ship on the 23d August, and left three men on board, and on the following morning returned and told the master he had seized her, and detained her until the 20th September following:—Held, that an action of trespass for the seizure, must be brought within three months from the day of boarding the vessel on the 23d August, as the act of seizure on that day must be considered as the matter or thing done.

the Court*.—The plaintiff is a subject of the king of the Netherlands, and master of the ship *Vriendschap*, a Dutch

* The rule for setting aside the nonsuit in *Michaelmas Term*, 1822, was obtained by Mr. Serjeant *Taddy* on another ground, viz. that although the ship was boarded by the defendant on the 23d August, yet that the seizure was not determined on, or completed until the 24th, from which day the matter or thing done must be computed, as it could not be considered as complete on the 23d, or first moment of taking; and if so, that the action was commenced in time, whether the three months limited by the 23d section of the statute were to be taken as lunar or calendar months; or that, taking it in another point of view, the act could not be considered as done, until the ship was given up or abandoned by the defendant on the 20th September following; as every day she was detained, might be considered a new taking; and if so, the last day of detention might be equal with the first, as far as regarded the effect of the plaintiff's notice of action.

Mr. Serjeant *Onslow* being about to shew cause in the last *Hilary Term*, was stopped by the Court, who called on Mr. Serjeant *Taddy* to support his rule, and confine himself to the point, as to whether the writ had, under the circumstances, been sued out and served in time within the provisions of the statute 28 Geo. 3, c. 37. He submitted, that whether it had or not, would depend on the 23d section of that statute, which requires an action to be commenced against any person, for any act done by him relating to His Majesty's revenues of customs or excise, within three months next after the matter or thing done. Nothing can be said to be done until actually finished, and in common parlance, things are said to arise when they commence, and to be done when completed, and this must apply to the whole thing done and not to a part only; and here, as the ship remained in the custody of the defendant, from the 23d August, to the 20th September following, it cannot be contended for a moment, that the act was done so as to require the plaintiff to give notice of action on the first of those days. It is an established principle, that every continuation of a trespass is in itself a fresh act, which the party aggrieved may take as the substantive ground of his complaint. Here, therefore, as far as regards the plaintiff's right of action; every day the ship was detained might be considered as a new taking. Although the case of *Godin v. Ferris* (a), may be

drogger; and the defendant was a midshipman belonging to His Majesty's ship the *Severn*. The plaintiff's ship ar-

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relied on for the defendant, it is altogether distinguishable from the present, as it turned on the construction of the statutes 23 *Geo. 3*, c. 70, s. 30, and 24 *Geo. 3*, sess. 2, c. 47, s. 35, which required the action to be brought within three months next after *the cause of action should arise*, as well as after the thing done or committed. Besides, there the detention by the defendant, after the three months, and up to the time of action, was occasioned by the act of the plaintiff himself, he having omitted to execute a writ of delivery, which would have restored to him the goods detained.—By the statute 24 *Geo. 2*, c. 44, s. 8, it is provided, that “no action shall be brought against any justice of the peace, for any thing done in the execution of his office, unless commenced within six calendar months after the act committed.” The expression “after the act committed” cannot be said to differ in meaning or substance from that of “after the matter or thing done.” And in *Pickersgill v. Palmer* (a), it was held, on the construction of that statute, that if a man be imprisoned by a Justice's warrant on the 1st of *January*, and kept in prison till the 1st of *February*, he would be in time if he brought his action within six months after the 1st of *February*; for that the whole imprisonment was one entire trespass. The same point was in effect determined in *Coventry v. Apsley* (b). So in *Massey v. Johnson* (c), which was the case of a continued imprisonment, the Court held, that the magistrate was liable to answer in an action for such part of the imprisonment suffered under his warrant, as was within six calendar months before the action commenced against him. And in *Clarke v. Davey* (d), where a distress was made on the 6th of *June*, and the action not commenced till the 6th of *December* following, a question was raised, as to whether it was brought within six calendar months after the act committed, as required by that statute. As, therefore, in the case of a committal, the last day of the imprisonment may be considered as within the time on which the notice of action may be given: and as in *Godin v. Ferris*, the action was not brought within three months after the *actual seizure*, which in this case was not made until the 24th of *August*, the action was commenced in time. The case of *Saunders v. Saunders* (e) merely shews that there is no distinction between an action of trover and an action of trespass, with respect to the time at which it must be commenced, within the 23d sec-

(a) Bull. Ni. Pri. 7th edit. by Bridgman, 24 a. — (b) 2 Salk. 440. — (c) 12 East, 67. — (d) Ante, Vol. IV. 465. — (e) 3 East, 254.

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rived in the *English Channel* on the 23d *August*, 1821; and on that day the defendant came on board her, left three armed men on board, and went away himself in the evening of that day, and returned on the following morning, and informed the plaintiff that he had seized the ship; and he in fact retained her from the 23d *August*, until the 20th *September* following. On the 15th *October*, a notice of action was served by the plaintiff's attorney upon the defendant, he being a person entitled to such notice, by virtue of the statute 28 *Geo.* 3, c. 37, s. 25, and on the 17th *November* following, a writ of *capias ad respondendum* was sued out against him, upon which the present action was commenced, and the defendant was duly served with a copy thereof.

The question for the opinion of the Court was, whether or not the action had been commenced in due time, (which would depend on the construction of the 23d, 25th and 26th sections of the above statute (a); and if the Court should be

tion of the statute 28 *Geo.* 3, c. 37, as the legality of the original seizure might be brought into question in each.—The learned Serjeant was proceeding with his argument, as to whether the word month in that section must be taken to mean a lunar or calendar month, when the Court observed, that it embraced a question of great importance, and general application; and as it would be necessary to look into all the statutes bearing upon the subject, as well as the decided cases, furnishing rules for their construction, a special case should be stated, to be confined to the point, as to whether the plaintiff's action should not have been commenced within one *lunar* month from the expiration of the notice. But they were clearly of opinion, that the three months must be computed from the 23d of *August*, when the defendant came on board the plaintiff's ship, and left three armed men there: as the matter or thing done was the act of seizure in the first instance, and that the case of *Godin v. Ferris* was decisive to shew that the act of seizure was the wrongful act or thing done. That if every day the ship was detained might be considered as a new trespass, the plaintiff might bring as many actions as the defendant had detained the ship days; and that there could be no doubt but that a verdict in the first, would operate as a bar to the whole.

(a) By the 23d section, it is enacted, that, "if any action or suit

of opinion, that the month mentioned in the 23d section, meant a lunar and not a calendar month, then the non-suit was to stand; but if they should be of opinion that the month mentioned in that section must be intended to mean a calendar and not a lunar month, then the non-suit was to be set aside, and a new trial had.

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The case now came on for argument, when Mr. Serjeant *Taddy* for the plaintiff, submitted, that on looking at the whole of the statute 28 Geo. 3, c. 37, and taking its different clauses collectively, as well as considering the intention of the Legislature when it was passed, it was obvious that the word "month" in the 23d section, must be considered and taken as a calendar month, and if so, that the present action against the defendant was commenced in time. That statute differs in terms from any other which has yet been brought under the consideration of a Court of law; as in all the cases in which a question has been raised as to the construction of the word "*month*,"

should be brought or commenced against any person or persons, for any thing by him or them done, in pursuance of that or any other act or acts of Parliament then in force, or thereafter to be made, relating to his Majesty's revenues of Customs and Excise, or either of them, such action or suit should be commenced *within three months* next after the matter or thing done."—By Section 25, it is enacted that, "no writ or process should be sued out against any officer of the Customs or Excise, or against any person or persons acting by his or their order, in his or their aid, for any thing done in the execution, or by reason of that or any other act or acts of Parliament then in force, or thereafter to be made, relating to his Majesty's said revenues, or either of them, until *one calendar month* next after notice in writing should have been delivered to him or them, or left at the usual place of his or their abode."—And by Section 26, it is provided that, "it should and might be lawful, to and for any such officer or officers, or other person or persons, acting in his or their aid, to whom such notice should be given as aforesaid, at any time *within one calendar month* after such notice should be given, to tender amends to the person or persons complaining, or to his or their agent or attorney."

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that word only has been used or adopted generally and uniformly throughout the whole of the statute in which it was introduced, so that it might most properly be taken to mean a lunar and not a calendar month, as in *Lacon v. Hooper*, where the word "month" was used in the statute 28 Geo. 3, c. 20, without the addition of "calendar" or any other words, to shew that the Legislature intended calendar; Lord *Kenyon* said (a), that "there was nothing in any part of that act from which it could be inferred that the Legislature meant calendar months." Here, however, the term "calendar" is introduced in the 25th and 26th sections, entitling a defendant to a calendar month's notice of action, and a like period in which to tender amends; and it was not the intention of the Legislature, to give one species of remedy to the officer, and another to the subject, but to afford an equal protection to each, and place them both on the same footing. It would be a great hardship that the party complaining should be restricted to three lunar months, within which to bring his action, and must yet give a calendar month's notice of such action; as it would tend to limit the rights of the subject on the one hand, and extend those of the revenue officer on the other; and it must therefore be presumed, that the word calendar has been inadvertently omitted in the 23d section, and that it was the meaning of the Legislature that it should be adopted throughout the whole of the statute. In the case of a contract, the word *month* may mean lunar or calendar month, according to the intention of the contracting parties. In *Lung v. Gale* (b), where, on a sale of land on the 24th *January*, it was agreed by the conditions of sale, that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date; and that a draft of the conveyance should

(a) 6 Term Rep. 227.—(b) 1 Mau. & Selw. 111.

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be delivered within three months from the said date, to be re-delivered within four months from the said date; and the purchase was to be completed on the 24th *June*, making a period of precisely five calendar months from the date of the sale and conditions:—it was held that the word months meant calendar and not lunar months, by reference to the whole period fixed for the completion of the contract. And Mr. Justice *Le Blanc* there said, that (a) “in matters temporal the term month is understood to mean lunar month, whilst in matters ecclesiastical it is deemed calendar; because in each of those matters a different mode of computation respectively prevails: the term, therefore, is taken in that sense, which is conformable to the subject matter to which it is applied. Still, in matters of contract, the question will ever be, what was the intention of the contracting parties, at the time when they made use of the word.” The same rule of construction was afterwards adopted by this Court, in *Cockell v. Gray* (b), where it was apparent, on the face of a composition deed, payable by instalments that the parties meant calendar months. Although that rule might not generally apply to the construction of a statute, yet the intention of the Legislature in the one case must be equally considered as the intent of the parties in the other. In *Catesby's* case (c), the words *tempus semestre* in the statute *West. 2, c. 5*, as relating to a *quare impedit*, were computed as calendar months:—and it was there laid down, that, (d) “when the computation is doubtful, it is good to determine it for the relief and remedy of him who hath right; and, for the advantage of right, to give him the longest time, to the end that he lose not his right.” The rule, therefore, that the word month, when used in a statute, must be understood to mean a lunar month, is not inflexible, but must depend on the construction of the whole of

(a) 1 Mau. & Selw. 117.—(b) *Ante*, vol. VI. 483. S. C. 3 Brod. & Bing. 186.—(c) 6 Rep. 61.—(d) *Id.* 62.

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the statute, and its context matter; and as the word *calendar* is expressly introduced in the subsequent clauses of the statute in question, it is not inserted by way of distinction, but illustration only, and more particularly so, as it would be unjust and inconsistent to construe the word *month* in two different senses, in one and the same act of Parliament.

Mr. Serjeant *Onslow*, *contra*, was stopped by the Court.

Lord Chief Justice DALLAS.—I entertain no doubt whatever in this case, and it appears to me, to be almost impossible that any really can exist. If the word *calendar* had not been inserted and repeated in the 25th and 26th sections of the statute, there might have been some ground for the argument; but as that word was omitted in the 23d section, on which the question depends, it seems to me to be an emphatic distinction, and expressly marked out by the Legislature; and that, in the one clause, they intended that the word *month* should be taken in its ordinary acceptance, *viz.* a lunar month; and in the others, according to the express words as well as legal construction of the statute, to mean a calendar month; and the Legislature must be taken to know the distinction between a lunar and a calendar month.

Mr. Justice PARK.—Where the word *month* is introduced generally into a statute, it has invariably been holden to mean a lunar, and not a calendar month. In cases of mercantile contracts, however, such as bills of exchange, and policies of insurance, the word “*month*” is by commercial usage to be construed as a “*calendar month*,” and it must be so considered, if, on the face of a deed, it appears to be the intention of the parties that such construction should prevail. Again it must be considered, that in passing sentence of imprisonment, the Judge always marks the distinction by introducing or prefixing the word “*calendar*,” to exclude the general computation of lunar months. In

Catesby's case, the computation turned on a matter of an ecclesiastical nature, and Lord *Kenyon*, in *Lacon v. Hooper*, observed, that (a) "in the instance of a *quare impedit*, (and which was brought in *Catesby's case*,) the computation of time was by calendar months, but that it depended on the words of an act of parliament, (13 *Edw. 1*, stat. 1, c. 5), *viz. tempus semestre*." In *Catesby's case* a distinction was taken by Lord *Coke*, between the singular and plural numbers, as a *twelvemonth*, which includes all the year according to the calendar, but that *twelve months* should be reckoned according to twenty-eight days to each month. Here it appears to me, that the Legislature have marked the distinction most strongly in the wording of the statute; and if an officer has acted in the execution of his duty, they have directed that an action must be commenced against him within three months next after the matter or thing done, which thereby limits the duration of his liability; whilst on the other hand, no process can be sued out against him until one calendar month after notice to be given to him; and he was also to be allowed the further time of one calendar month, to tender amends, after such notice was given; and these two latter sections were intended to operate in his favor.

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CROOK
v.
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Mr. Justice BURROUGH was of the same opinion.

Judgment for the defendant.

(a) 6 Term Rep. 226.

KEMP v. POWELL.

Friday,
June 13th.

MR Serjeant *Onslow* moved, that the affixing the notice of declaration in this cause in the Prothonotary's office, might be deemed good service, on an affidavit which stated that the defendant was the manager of a travelling company's office, to be good service, although it was sworn that the defendant had no fixed place of residence, and that the plaintiff did not know where to find him.

The Court will not allow the affixing a notice of declaration in the Prothonotary's office.

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v.
POWELL.

pany of equestrians and public performers, that he had no fixed place of abode, but travelled from place to place; and that the plaintiff did not know where to find him. The learned Serjeant cited the cases of *Weller v. Robinson* (a), and *Dirris v. Mackenzie* (b), where the Court granted applications of this description.

But the Court observed that in *Weller v. Robinson* Mr. Justice *Lawrence* said, that "this practice had crept in, but that he could find no rule by which it was authorized, and that the Court ought not to countenance it." So in *Dirris v. Mackenzie*, the express permission of the Court was required, and a compliance with an application of this nature, must depend on the special circumstances of each particular case, as the general rule requiring personal service ought not to be departed from, but in cases of the last necessity; and it is sufficient here to say, that the affidavit does not disclose sufficient facts to warrant this application.

The Learned Serjeant therefore took nothing by his motion.

(a) 1 Taunt. 439.—(b) 5 Taunt. 777.

Friday,
June 13th.

CONNOP, Demandant; LENNARD, Tenant;
ALDER and Another, Vouchees.

Where two of the commissioners named in the *dedimus*, and before whom the acknowledgment was taken, were the attornies for the vouchees, the Court would not allow the recovery to pass.

Mr. Serjeant *Laves* moved that this recovery might be permitted to pass, notwithstanding that in taking the acknowledgment of the vouchees to the warrant of attorney, two of the commissioners named in the *dedimus*, had introduced their own names, as the attornies for the vouchees. He founded his motion on an affidavit, which stated that it was done inadvertently, and without fraud; and that one of the vouchees had married since the acknowledgment,

and made a re-settlement of the property, so that another acknowledgment could not be taken; and that the application was made on behalf of all the parties to the recovery.

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CONNOR
Demandant,
ALDER
Vouchee.

But the Court referred to the case of *Shaw*, Demandant; *Ware*, Tenant; *Clulow*, Vouchee(a), where it was held that the attorney upon the record could not be a commissioner for taking the acknowledgment of the warrant constituting himself the attorney. They observed that it was not only a defect in form, but in substance, as it might tend to facilitate frauds; that if all the parties agreed, a new recovery might be suffered; but that it was highly necessary to attend to forms, in all instruments of this nature, which had of late been frequently much neglected.

The learned Serjeant therefore took nothing by his motion.

(a) 4 Taunt. 590.

MAYER and Others, Assignees of DAVISON, a Bankrupt, v.
NIAS.

Saturday,
June 14th.

THIS was an action of *assumpsit* brought by the plaintiffs, as assignees of *Davison*, a bankrupt, to recover the value of goods sold and delivered to the defendant by the bankrupt. In all the counts of the declaration the cause of action was averred to have accrued before the bankruptcy, with the exception of one, which was on an account stated between the defendant and the plaintiffs, as assignees of the bankrupt, after the bankruptcy. The defendant pleaded the general issue.

Where the defendant ordered goods, to be paid for in ready money, and on being applied to for payment by the vendor's agent, tendered him a bill of exchange accepted by the vendor, and which had become

due, and was dishonored before the goods were ordered, and the agent at first refused to accept the bill in part payment, but afterwards took it to the vendor, who retained it:—Held, in an action of *assumpsit* by the assignees of the vendor, to recover the value of the goods, that in the absence of any evidence of fraud, the delivery and retention of the bill were equivalent to payment.

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MAYER
v.
NILES.

At the trial before Mr. Justice *Burrough* at *Guildhall*, at the sittings in the last Term, the trading and act of bankruptcy by *Davison*, and the petitioning creditor's debt were duly proved, and that the goods were delivered after the act of bankruptcy was committed.—The bankrupt's brother swore that in *April*, 1822, the defendant ordered goods from the bankrupt to the amount of 142*l.*, which were to be paid for in ready money; that goods to the amount of 132*l.* were delivered in the month of *May* following. That the bankrupt being then in prison, he sent the witness to the defendant for payment of that sum, which he promised to comply with, on having a receipt from the bankrupt. That the witness afterwards waited on the defendant with the receipt, when, instead of paying in cash, he deducted 6*l.* 12*s.* discount for ready money, gave a check for 14*l.* 17*s.*, and a dishonored bill for 90*l.* 11*s.*, drawn by *Reid & Co.* upon and accepted by the bankrupt, and which became due in *April*, 1822, and which, together with 20*l.* advanced by the defendant to the bankrupt when the goods were ordered, amounted to the sum of 132*l.* That the witness being dissatisfied with this mode of payment, at first refused to take the bill, but on its being thrown down before him, he took it up and carried it to his brother the bankrupt, who kept it; and it afterwards came into the possession of the plaintiffs as his assignees, and was produced by them in evidence at the trial; for whom it was contended, that even if the debt could be considered as satisfied, yet that the defendant had possessed himself of the bill fraudulently.—But there being no evidence of fraud; and the learned Judge being of opinion that the action could not be supported on either of the counts which stated the cause of action to have accrued before the bankruptcy, and that the facts disclosed by the bankrupt's brother amounted to a payment by the defendant, as the bankrupt had eventually retained the bill of exchange accepted by him;—or that upon the account stated between the defend-

ant and the assignees, he was entitled to give in evidence the settlement of the account by way of set off, and as the bill in question formed part of such account, he directed a nonsuit, reserving leave to the plaintiffs to move to set it aside and have a verdict entered for them, in case the Court should be of opinion that they were entitled to recover.

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MAYER
v.
NIAS.

Mr. Serjeant *Vaughan* in the last Term accordingly obtained a rule *nisi*, that this nonsuit might be set aside, and a verdict entered for the plaintiffs for 112*l.*, or a new trial granted, on the ground that under the circumstances, the payment by the defendant to the bankrupt's brother, was not made in the ordinary course of trade, but was intended to operate as a fraud on the other creditors. The defendant must have known the situation of the bankrupt when the goods were furnished; and as the bill was over-due when the order was given, it must be presumed that the defendant became possessed of it from the holders, for the purpose of obtaining value for it through the purchase of the goods in question. Besides, the bankrupt had, in point of fact, deposited goods with the drawers as a security for the payment of the bill. This case therefore falls expressly within that of *Fair v. M'Iver* (a), where third persons holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months, (before which time the trader's acceptance would be due,) but without communicating to the trader that they were the holders of his acceptance, and the trader having become bankrupt, his assignees brought *assumpsit* to recover the value of the goods sold and delivered to the defendants: it was held, that the latter could not set off the bank-

1822.
MAYOR
v.
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rupt's acceptance, as they did not hold it in their own right, but in effect for such other persons. So here it must be inferred, that the bill was in the hands of the drawers when it became due, and when the goods in question were purchased from the bankrupt by the defendant.

Mr. Serjeant *Pell* now shewed cause, and submitted, that although the bill was dishonored and over-due at the time the goods were ordered, yet as it had been taken away by the bankrupt's brother when it was offered by the defendant in part payment for the goods, and afterwards retained by the bankrupt himself, and never offered to be returned to the defendant, it amounted to a payment so as to operate in discharge of the debt due from the defendant to the bankrupt, and deprive the plaintiffs, as his assignees, of any right of action they might otherwise have had against the defendant, to recover the value of the goods. This case is altogether distinguishable from that of *Fair v. M'Iver*, as there the goods had been sold by a trader two months previously to his bankruptcy, and there was a fraudulent combination between the parties; and the defendants, as vendees, attempted to set off a bill of the bankrupt received by them from a third person before the purchase, under the idea that the vendor was failing, and with the view of covering it by the purchase. Here, however, there was not the slightest evidence of fraud; the bill therefore must be taken to have come into the possession of the defendant honestly, and in the due course of trade; and if so, he had a right to set it off against a demand by the plaintiffs as the assignees of *Davison*, upon an account stated with them after the bankruptcy, and as the bankrupt himself retained the bill, and it afterwards came into the possession of the plaintiffs as his assignees, and was produced by them at the trial, it was equivalent to payment by the defendant; and the receipt given to him by the bankrupt, was a complete discharge of his debt.

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Mr. Serjeant *Vaughan* in support of the rule, contended, that as the sale of the goods to the defendant was for ready money, the bill in question could not be set off against the plaintiffs' demand, as it was over-due before the goods were ordered. So the act of bankruptcy was committed before the order was given; and when the settlement took place between the defendant and the bankrupt's brother, the bankrupt himself was in prison. Although fraud was not actually proved at the trial, yet as the bill was over-due before the goods were even ordered, that circumstance, coupled with the mode of payment, furnished an almost irresistible inference that the goods were ordered with the express view of getting value for the bill by surreptitious means; and if this were so, the present case cannot be distinguished from that of *Fair v. M'Iver*.

Lord Chief Justice DALLAS.—I think this rule ought to be discharged. In the first place, no fraud has been actually made out, and taking the case upon the facts only, as they appeared at the trial, the defendant must be considered as having been lawfully in possession of the bill. Was it then accepted or taken by the bankrupt in part payment for the goods? It is true it was thrown down before his brother at the time of the settlement; and although rejected by him at first, yet he afterwards took it up and carried it to the bankrupt, by whom it was eventually retained. Assuming then that the defendant came honestly by the bill, it must, under the circumstances, be deemed equivalent to payment, or may be considered as a mutual debt, and consequently furnishing a fair subject of set-off, as between the defendant and the assignees on the account stated between them.

Mr. Justice PARK.—The application to set aside the non-suit in this case, must be considered as founded on the misdirection of my Brother *Burrough* to the jury, as he stated, that the facts disclosed by the bankrupt's brother

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amounted to a payment by the defendant; and the evidence in that respect was altogether unanswered. The bankrupt, as the acceptor of the bill, was always liable for its payment; and although, when it was thrown down before his brother, he at first refused to take it up, yet, as he afterwards did so, and delivered it to the bankrupt who retained it, and never sent it back, he thereby confirmed his liability. In the case of *Fair v. M'Iver*, (in which I was counsel,) fraud was clearly established, as the defendants were not the real owners of the bill, but combined with those who were, for the purpose of setting it off as payment for goods which were to be paid for in another mode to the bankrupt, which should be available to him as cash, no communication being made to him that the defendants were the holders of his acceptance at the time. But there appearing to be no evidence of fraud in this case, the decision in *Eland v. Karr* (a) seems to me to be particularly applicable, where it was in terms decided, that if a creditor purchase goods of his debtor to be paid for in ready money, the creditor might nevertheless set off his demand against an action for the price. There, to an action of *assumpsit* for goods sold and delivered; the defendant pleaded a set-off upon various bills of exchange, the latest of which was over-due; and the plaintiff replied, that the goods were agreed to be paid for in ready money; but the Court held, that the replication was bad on demurrer, as it afforded no answer to the plea: and although Lord *Ellenborough* in *Fair v. M'Iver*, said, that (b) "he deferred to the authority of *Eland v. Karr*, but was not convinced by it," yet it must be remarked, that that case was decided by Lord *Kenyon* and the rest of the Court, and there is no subsequent decision where it has been infringed on or over-ruled.

Mr. Justice BURROUGH concurring,

Rule discharged (c).

(a) 1 East, 375.—(b) 16 East, 138.—(c) See *Hankey v. Smith*, 3 Term. Rep. 507 n. *Bennett v. Spackman*, 1 Carr. N. P. C. 274.

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IN THE EXCHEQUER CHAMBER.

CAMPBELL v. JAMESON and Another.

(In error.)

Monday,
June 16th.

THIS was a writ of error from a judgment given in the Court of *King's Bench* in an action of debt on bond. The plaintiff in error (defendant below) had pleaded his bankruptcy and a certificate obtained under it, dated the 22d June, 1819. The replication set out the condition of the bond, by which it appeared to have been given by him as a member of Parliament, with two sureties, under the statute 4 Geo. 3, c. 38, § 1, conditioned for the payment of such a sum as should be recovered in a certain action then pending in the Court of *Common Pleas* between the defendants in error, (plaintiffs below), and plaintiff in error, (defendant below), together with such costs as should be given in the same. It was then averred, that after the bankruptcy, to wit, in *Easter Term*, 59 Geo. 3, judgment was given in that action in the Court of *Common Pleas*, against the plaintiff in error, (defendant below), for the sum of 269*l.*, and so that the bond was forfeited by the non-payment of that sum. To this replication there was a general demurrer and joinder, and after argument in the Court of *King's Bench*, in *Easter Term*, 1821, that Court after taking time to consider;—in the *Michaelmas Term* following, gave judgment for the plaintiffs below, (defendants in error) (*u*).

This case was twice argued in the Exchequer Chamber, first in *Michaelmas Term*, last, by Mr. *Wilde*, for the plain-

Where a bond was given under the statute 4 Geo. 3, c. 38, s. 1, by a member of Parliament being a trader, and two sureties, and judgment was obtained in the suit in which the bond was given, after the bankruptcy, but before certificate:—Held, that the bankruptcy and certificate were no discharge to the bond.

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tiff in error; and Mr. *Parke*, for the defendants in error, and again in this Term, by Mr. *F. Pollock*, for the plaintiff in error, and Mr. *Campbell* for the defendants in error.

Arguments for the plaintiff in error.—The general question to be considered is, whether a bond given under the statute 4 *Geo. 3*, c. 33, by a trading member of Parliament and two sureties, is discharged by the bankruptcy and certificate of the principal; where judgment was obtained in the suit in which the bond was given, after the bankruptcy, but before certificate? This will depend on the policy and principles of the existing bankrupt laws, which were passed for the purposes of enforcing an equal distribution of a bankrupt's effects among all his creditors, and preventing frauds which might otherwise be committed by traders who were subject to such laws. By recent statutes and decisions, a bankrupt who has obtained his certificate, is thereby effectually discharged from all the previous claims of his creditors, and freed from all engagements relating to his trade, which he might have entered into previously to his bankruptcy. Those statutes have also empowered the creditors to prove their debts under the commission, as well as to give the bankrupt every benefit to be derived from such proof, by eventually allowing his discharge, on his duly obtaining a certificate. It is necessary in the first place to look at the title, preamble and terms of the statute 4 *Geo. 3*, which has been since amended and rendered effectual by the statute 45 *Geo. 3*, c. 124, as it was found difficult, if not impossible, in some instances, to enforce the entering appearances in the actions for the payment of the sums to be recovered in which bonds had been given under the former statute.—The object of passing that act, was to prevent inconveniencies arising in cases of merchants, and such other persons as were within the description of the statutes relating to bankrupts, who were entitled to privilege of Parliament, and therefore not liable to personal

arrest on their becoming insolvent, and who might consequently for a long time avoid the committing any of the usual acts of bankruptcy, and thereby delay their creditors from the relief afforded by a commission of bankrupt. The Legislature thereby intended to put members of Parliament, who were traders, on the same footing as other individuals, by giving their creditors a remedy against them, who were before subject to two inconveniencies; as persons having privilege of Parliament were not compellable to pay their just debts, or become bankrupts: to remedy which, and to support credit in commercial dealings, which required that the laws should have their due course, and that no such person should be excepted from doing equal justice to all their creditors, the statute in question was passed: and a member of Parliament who becomes bankrupt, cannot be deprived of that advantage which the different statutes afford to every other bankrupt who conducts himself with honour and integrity. The original action was brought against the plaintiff in error, (defendant below), as the acceptor of a bill of exchange which was clearly proveable under the commission, and the certificate undoubtedly operates as a discharge in law from the debt due on that bill; and as the bond in question was given as a mere collateral security for such pre-existing debt, it is equally discharged, and cannot now be enforced. The instant the original debt was ascertained by the judgment, it became by relation a debt due before the bankruptcy, and as such was proveable under the commission; and the debt itself was not contingent, but the security only, which depended on the event of the judgment. If then the pre-existing debt be discharged by the certificate, so is the accessorial debt created by the bond. This cannot be assimilated to the case of an annuity secured by bond and covenant, as there can be no pre-existing debt until the annuity is in arrear; and although the covenant which is a continuing security is not discharged with respect to ar-

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years growing due after the bankruptcy, yet the bond being given in a penal sum, and conditioned to secure the same annuity, if forfeited, so as to make the penalty a debt at law before the bankruptcy, the value of the annuity may be proved, and a certificate obtained afterwards will discharge the grantor from all suit on the bond, as well for future as prior payments of the annuity, as such bond could only be put in suit once, as applying to the pre-existing debt. If the plaintiffs below had not proceeded to judgment, it is quite clear that they might have proved their original debt under the commission; and the sole intent and purpose for which the bond was given, was to secure the payment of the bill of exchange on which the original suit was commenced. If a release had been given for the original debt previously to judgment, the bond could no longer be enforced, and the certificate is in the nature of a statutable release, and is equally efficient as a personal instrument of that nature. If a creditor requires his debtor to give him a warrant of attorney to enter up judgment for the debt due to him, as well as a bond conditioned for the payment of the sum to be recovered by the judgment, and he does not cause judgment to be entered up until after a commission of bankruptcy has issued against his debtor, can it be said that he may sue the bankrupt on his bond, and so obtain the whole of his debt, notwithstanding the bankrupt may have obtained his certificate? If a bankrupt be taken in execution under a judgment, after he has obtained his certificate, and compelled to pay the amount of the sum for which he is so taken, he may have his remedy by *audita querela*, and recover it back, on the ground that it was proveable under the commission, and discharged by the certificate. So, in an action of escape against a sheriff, if the original judgment be reversed, he may have an *audita querela*, or prevent execution from being taken out on such judgment. Here, the bond was given as a dependent and collateral security for the payment of such sum as should be recovered in the action then pending on the bill of exchange, and

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does not differ in terms from an arbitration bond, by which the obligor binds himself to abide the award of the arbitrator, or pay such sum as he may direct; which, when ascertained, has reference to the original matter referred; and which is clearly discharged by certificate. The debt originally sought to be recovered in this case, was on a bill of exchange accepted by the plaintiff in error, existing and overdue at the time the action on it was commenced, and which was not contingent in itself, but proveable under the commission; and the bond was merely given to secure the payment of its amount and costs incurred in the action. The giving the bond did not extinguish the original debt on the bill, which, from the commencement of the action to the present moment, might have been proved under the commission; and which is not extinguished by the bond; as the sole object of the Legislature in passing the statute 4 Geo. 3, was to provide for the recovery of the original debt. The cases applicable to bail-bonds bear no analogy to the present, as they are conditioned for the performance of a collateral act, *viz.* the appearance of the defendant, which must be complied with at all events, whether there were a pre-existing debt or not. But where a bond is given as a security for the payment of such sum as shall be recovered in the action brought, the case is altogether different. If bail are not duly put in, the plaintiff is altogether deprived of his security; and the damages he may have sustained thereby, are to be ascertained by a jury. That, therefore, is altogether a collateral act, but here it is not so. And where a person having privilege of parliament has become bankrupt by virtue of the statute 4 Geo. 3, the bankruptcy must be given effect to in all its parts; and if he obtains his certificate, it may be pleaded so as to deprive the obligee from obtaining judgment on the bond. The time when judgment might be given in the original action was altogether accidental; or whether it might be ever given, was a matter of doubt and uncertainty. Although it may

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be said, that the sureties may be liable to an action on the bond, and, if compellable to pay, may sue the plaintiff in error as their principal for reimbursement; yet by the 49 Geo. 3, c. 121, s. 8, they are allowed to prove under the commission whatever debt they may be called on to pay on account of their principal, so that no circuity of action is to be apprehended by discharging the bankrupt from his bond. He therefore is not personally liable to them, nor can they recover from him, although they might have done so, if taken with reference to the law, as it stood before that statute was passed. Although the statute 7 Geo. 1, c. 31, first provided that bonds payable at a future day might be proveable under a commission; yet in *Utterson v. Vernon*, Lord *Kenyon* said, that (a) "that statute was declaratory of the common law;" and Mr. Justice *Buller* observed, that (b) "the object of the act was, that all demands that existed prior to the time of the bankruptcy, though not payable till a future day, might be proved under a commission of bankrupt, provided they were capable of being ascertained." That may be applicable to the statute 4 Geo. 3, when a bond is given as a security for the original debt and costs, the debt itself being not only ascertained but actually due and sued for, and which might have been proved under the commission as well as the costs, as they are only an accessory to the debt; if so, the bond itself was in the nature of a proveable debt at common law, and cannot be considered as a security for a sum not due or payable before the time of the obligor's becoming bankrupt; as the debt for which it was given did not rest on any contingency, so as to bring it within the language of the statute 7 Geo. 1. The bond is conditioned for the payment of such a sum as should be recovered in a certain action then pending between the parties, together with such costs as should be given in the same. The word "reco-

(a) 3 Term Rep. 546. — (b) *Id.* 548.

vered" is not to be taken in its literal sense, as to the precise sum the party may receive or repossess himself of, but, in a legal acceptation, signifies an obtaining any thing by judgment or trial at law (a), and every judgment is a recovery, by the words "*ideo consideratum est quod recuperet (b).*" A party taking a bond of this description, places himself in the same situation as a petitioning creditor, and is to receive no greater advantage. He may prove his original demand under the commission, but having such a security, he is not bound to do so in the first instance, but may postpone such proof until the amount of such original claim is ascertained by action, when he may waive the effect of the bond, and prove the amount of such ascertained debt as in an ordinary case. And a member of Parliament who becomes bankrupt, is not to be put in a worse situation than other traders; as the sole object of the Legislature was to make him amenable to the bankrupt laws; and if he might be compelled to give a bond to one, two, three, or an indefinite number of creditors, he would be placed in a most unequal and unjust situation, and deprived of those advantages which all other bankrupts are entitled to enjoy. The bond gives no new right to the obligor, and is merely given as a security for the judgment; which judgment must stand in the nature of a security for the original debt, which was existing and known at the time the commission issued, and which was consequently not in the nature of a contingent security: and the giving the bond could not create any new liability. In *Bryant v. Withers* (c), it was held, that a judgment must be taken as a security for the original debt, and consequently that a debt for money lent, due to a creditor at the time an act of bankruptcy was committed by the debtor, was sufficient to support a commission against him, although afterwards, and before

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(a) Jacobs's Law Dictionary, tit. Recovery.——(b) Termes de la Ley. 513.——(c) 2 Mau. & Selw. 123. S. C. 2 Rose, Bank. Cas. 8.

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petitioning for such commission, the creditor obtained judgment against him for a sum of money including such debt. Here, however, the judgment is gone as well as the original debt it was intended to secure, and both are now unavailable as a debt, and the certificate is equally a bar to each; nor can the bond be put in force, which was a mere collateral security for such judgment and debt. In *Vax Sandau v. Corsbie* (a), where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate, in order to raise money to pay the bill, the certificate was held to be a good bar to such consequential damage, as it could only have been recovered as an accessory to the principal debt, which was discharged by the certificate; and Mr. Justice Bayley there said (b), that "the statute 49 Geo. 3, c. 121, makes the certificate not only a bar to the principal debt, but also to any consequential damage arising from that debt not having been duly paid; and that with respect to costs, it had been decided, that they are in the nature of an accessory; and that when the right to the principal is barred, the right to the accessory is barred also." *Scott v. Ambrose* (c). And Mr. Justice Holroyd observed, that "where the right to the principal debt is barred by statute, the right to damages, which are accessory to and consequential on that principal debt, is also barred." And Mr. Justice Best said, that (d) "he thought that the certificate operated as a release of the debt, and of all demands arising out of that debt; and that it would be absurd, that when the debt itself was released, the consequential damage resulting from it should remain a charge upon the bankrupt; and that if it were so held, it would

(a) 3 Barn. & Ald. 13.—(b) *Id.* 19.—(c) 3 Mau. & Selw. 396.
 (d) 8 Barn. & Ald. 20.

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deprive the bankrupt of one of the great advantages intended to be conferred on him by the Legislature." So here, it would be equally absurd as against the principal on the bond, that the original debt should be extinguished, and that the security should remain available. The bond was not severable from the judgment, and the certificate is a bar to both. It may be said, however, that the bond was entered into voluntarily, but that was not the case, as it was absolutely required by the Legislature as a security for the original debt; and as the one is released, so also is the other. A bond of this description can only be required where the original debt is proveable under the commission, and where an affidavit of debt can be made; and there is no decision where a debt is proveable as such under a commission, that any existing security for it is not discharged by the certificate, provided it be connected with such debt, with the exception of *Cockerill v. Owston* (a), which bears no analogy to the present, as it was the case of a bail-bond conditioned to enter an appearance, and not for the payment of money. Although bail cannot plead the certificate of their principal in discharge, yet they may be relieved on motion; and though the Court will not interfere in behalf of bail in error, according to the case of *Southcote v. Braithwaite* (b), where their principal had become bankrupt pending the writ, yet the ground of that decision was, that as bail in error could not render their principal, they continued liable at all events. It is true that in *Hunter v. Campbell* (c), the Court decided that they would not interfere, or order a bond to be cancelled in a case of this description on motion, but here the sureties must be considered with reference to the statute 49 Geo. 3, c. 121, s. 8, as all the statutes relating to bankruptcy must be taken *in pari materid*. Even if they were not so, they might either plead a release, or proceed by an-

(a) 1 Burr. 436.—(b) 1 Term Rep. 624.—(c) 3 Barn. & Ald. 273.

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dita querela; and if they stood in the situation of bail, it is clear they would be discharged, as wherever the principal is discharged, the bail are discharged also. In *Rolle's Abridgment* (a) it is said, that "if the principal be taken in execution upon a judgment, and after a *scire facias* returned, according to course, judgment is given against the bail, and thereupon he is taken in execution, and afterwards the principal is delivered upon an *audita querela*; because the recoveror hath acknowledged satisfaction, &c.—In this case, though the recognizance was forfeited by the bail, by not bringing in the principal at the time appointed by law; yet, inasmuch as the judgment and execution against the bail depend upon the judgment against the principal, and he was but a security for the payment of the money, of which the recoveror is satisfied, the bail shall consequently be discharged:" and this is said to have been adjudged in the case of *Hill v. Barnes* on demurrer. So here, if the sureties were sued on the bond, they could only be liable to pay so much as their principal was bound to pay; and as the judgment was not in force as against him, he would be entitled to relief by *audita querela*. The form of that writ is to be found in *Lilly's Modern Entries* (b), where a bankrupt was taken in execution after the allowance of his certificate; and the mode of proceeding is set out in the case of *Lord Portchester v. Petrie* (c).

No valid distinction can be drawn between a satisfaction obtained by statutable means, or by deed; and here the certificate operates as a statutable release of the original debt, and as the bankrupt was thereby discharged, so were his sureties; and the bond cannot be put in force against either of them, as it was given as a mere collateral security for the payment of the original debt, which was not founded on a contingency, and was consequently proveable under the commission.

(a) Vol. I. 306, pl. 10.—(b) Vol. II. 533.—(c) 2 Wms. Saund. 148 (d). n. 1.

Arguments for the defendants in error.—The bond in question cannot be considered as a debt from which the bankrupt was discharged by virtue of the statute 5 *Geo. 2*, c. 30, s. 7, as being due at the time of the bankruptcy; as the provision therein is confined in terms to the original judgment obtained between bankruptcy and certificate, and does not extend to a security given for payment of the sum that may be thereby recovered; and the bond creates a new and independent specialty debt, of a higher, and altogether different nature from the original demand on which the action was commenced, and which is still binding on the obligor and his sureties, as it has never been satisfied, nor was it proveable under the commission. The object of the statutes 4 *Geo. 3*, c. 33; and 45 *Geo. 3*, c. 121, was to create a compulsory act of bankruptcy by members of Parliament being traders, so as to enforce the payment of their debts, and if they do not give a bond as required by the first section of the former statute, a commission may be sued out against them, and proceedings taken thereon as against other bankrupts, and all their property would be liable to an equal distribution among their creditors. When the bond is given, it is analogous to a bail-bond, (although not in terms), and the parties to it must be considered as standing in the same situation as those on an instrument of that description. It is quite clear, that the bond was not proveable under the commission at common law, even in the event of judgment being obtained; as in *Callowel v. Clutterbuck* (a), it was decided that only those debts which were due and payable at the time of the bankruptcy could be proved under a commission. Neither could the bond be proved under the statute 7 *Geo. 1*, c. 31, as the debt arising on it rested on a contingency. It is therefore unnecessary to consider whether that statute is declaratory or not. The time was clearly contingent, as

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(a) Cited in *Tully v. Sparkes*, 2 Str. 867.

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it could not be ascertained when judgment would be given: it might never be given, as it might be rendered unnecessary by the death of the parties. So, until the judgment was recovered, it was impossible to ascertain whether there was any debt due or payable from the bankrupt to the plaintiff in the action then pending; and it was also uncertain in whose favor the Court might decide, or what costs might be given. The bond therefore, was not conditioned for the payment of a sum due and payable at the time the obligor became bankrupt; and even under the statute 7 Geo. 1, the time of payment must be certain, as in *Ex parte Barker* (a) it was held, that a debt payable at a future uncertain period, as within three months after the decease of two obligors in a bond, or the survivor, cannot be proved under a commission. Besides, that statute requires a rebate of interest on the proof of securities, payable at future times, which can only be calculated where the debt itself is certain, and does not depend on a contingency. The bankruptcy and certificate therefore can be no bar to an action on the bond. Although, however, the bond was not proveable, it has still been urged, that the original debt might have been proved, and the case of a bond conditioned to submit to arbitration has been put, which bears no resemblance to the present, as the parties would be liable on the bond, if the award were made after the bankruptcy. But the case of an annuity secured by bond and covenant, bears a nearer resemblance to the present, although it has been attempted to be distinguished. And though the bond in such a case, if forfeited by non-payment before the bankruptcy, may be proved; yet in an action on the covenant for not paying subsequent instalments, the certificate would be no bar. *Cotterel v. Hooke* (b), *Ex parte Granger* (c). So, although a bail bond is only conditioned for the appearance of the party in Court, it is

(a) 9 Ves. 110.—(b) 1 Doug. 97.—(c) 10 Ves. 351.

nevertheless, in effect, a security for the payment of the debt due from such party, and by the statute 4 & 5 Anne, c. 16, may be assigned as a security for such original debt. The distinction is, that where a bail-bond is forfeited before the bankruptcy, the obligor is discharged by his certificate, according to the cases of *Boutefleur v. Coats (a)*, and *Dinsdale v. Eames (b)*, but if such bond be not forfeited at the time of, or until after the bankruptcy, the certificate, although it operates as a discharge from the debt for which the original action was brought, does not so operate on the judgment obtained in the action on the bond, as the latter debt could not be proved under the commission, as it was a new and distinct cause of action. *Cockerill v. Oulton (c)*. So, here, as the bond was not forfeited until after the bankruptcy, it created a new cause of action, and was given as a substitute for a bail-bond, which in other cases is obtained through the medium of an arrest, from which the plaintiff in error was privileged, and consequently could neither be required to give a bond to the sheriff for his appearance, nor to put in bail to the action in the usual way.

With respect to the sureties on the bond, they are liable at all events, and must be considered with reference to the law, as standing in the same situation as they would have done if the statute 49 Geo. 3, had not been passed, which is confined to matters between the sureties and their principals, and does not touch the rights or remedies of the original creditor, nor does it apply to debts founded on a contingency, but to existing debts only, and payable at the time of the bankruptcy. Although it has been said that the sureties may be assimilated to bail, and are entitled to relief on motion, or may have their remedy by *audita querela*, yet they must be considered as bail in

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(a) Cowp. 25.—(b) *Ante*, Vol. IV. 350. S. C. 3 Brod. & Bing. 8.
(c) 1 Burr. 436.

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error, who have not the alternative of rendering their principal; and in *Hockley v. Merry* (a) it was held, that where an act of bankruptcy took place between a party's becoming bail in error, and the affirmance, he is not discharged from his recognizance, as the debt was contingent at the time of the bankruptcy, and could not be proved under a commission against the surety; as the statute 7 Geo. 1, only let in those where the payment was certain, though future. The case relied on from *Rolle's Abridgment*, merely goes to shew, that, if after a judgment against the principal, the judgment creditor confesses satisfaction on the roll, he cannot afterwards proceed against the bail. Here, however, the bond remains wholly unsatisfied, nor has any sum been paid so as to operate as a release of the judgment. The sureties are consequently liable at all events, and if called on to pay the debt, they will have their remedy against the plaintiff in error as their principal on the bond.

In reply, it was submitted, that the cases applicable to annuities and bail-bonds were altogether distinguishable from the present, as the bond in question was given as a mere collateral security for the payment of a pre-existing debt, which was proveable under the commission. Although a bail-bond may be said to be in the nature of a security for the original debt due from the principal to the party suing, yet it is conditioned for the appearance of the defendant, and in case of default, damages may be assessed accordingly; and at the time the bond is given, the due prosecution of the suit is alone in the contemplation of the parties. Here, if no bond had been given, or appearance entered, as required by the statute 4 Geo. 3, and 45 Geo. 3, a commission might be sued out at the suit of the same creditor who was the plaintiff in the original suit, as it would

(a) 2 Stra. 1043.

create a new act of bankruptcy; and it was the intention of the Legislature, that a trading member of Parliament should enjoy the same privileges and advantages as other traders in a like situation. As a commission is sued out for the benefit of creditors generally, and the bankrupt is discharged, or released from all his debts, which were proveable under the commission, by obtaining his certificate; it would be too much to say, that he should nevertheless continue liable on superincumbent securities. The bond not only recited a pre-existing demand, but shewed what sum was originally due, and the case of *Ex parte Barker*, as to the death of the parties, does not bear on the present question, as it did not refer to a pre-existing debt, which might be proved independently of the bond. An arbitration-bond is tantamount to a security of this nature, and may in terms be considered as *idem per idem*, as both are conditioned for the payment of such a sum as may eventually be found to be due. Although the sureties on the bond may be liable, it by no means follows, that the plaintiff in error is responsible to them, as he is discharged by his certificate, which might be effectually pleaded in the event of an action brought by them against him, or at all events they may prove under the commission any damage they may have sustained, by virtue of the statute 49 Geo. 3, c. 121.

Lord Chief Justice *Abbott* in delivering the judgment of the Court below said, that (a) "a bond given in a case of this description was undoubtedly intended as a substitute for that security, which, in other cases, is obtained through the medium of an arrest; though the statute is imperfectly framed with a view to the intended object." If so, it is analogous to the case of bail to the action, who, although they may be originally responsible, are still entitled to relief where their principal has become bankrupt and ob-

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(a) 5 Barn. & Ald. 255.

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tained his certificate. Although it has been said, that the sureties in this case continue liable at all events, and in case of being called on for payment, might sue their principal for reimbursement, so that he would not be discharged from the effect and consequences of the bond; yet, as the judgment in the Court of *Common Pleas* had ceased to exist, as it was discharged by the certificate, *cessante ratione legis, cessat ipsa lex*; and by the statute 49 Geo. 3, the principal was clearly exonerated from any responsibility, which before the passing of that act he might be under to his sureties. If, therefore, he was discharged as to them, it was the intent of the Legislature that he should be discharged altogether. Bail are discharged by the death of their principal. So in case of a collateral satisfaction by their principal, they are immediately entitled to relief. As, therefore, the rights of the parties are to be considered at the time the bond was entered into, and the statute 4 Geo. 3, did not intend to create any new liability, but merely to provide or furnish a security for a pre-existing debt which was proveable under the commission; the certificate must operate as a discharge to such debt, and more particularly so, as the judgment itself was gone, or must be considered as nugatory as far as regarded the plaintiff in error, as it only referred to the original debt, which, on being ascertained, was proveable under the commission, and has since been discharged by the certificate.

Lord Chief Justice DALLAS.—We are all of opinion, that the judgment of the Court below in this case must be

Affirmed.

Mr. Campbell then moved for interest on the affirmance, which was

Refused.

1828.

IN THE EXCHEQUER CHAMBER.

MAY and two Others v. PIGE.

Monday,
June 16th.

(In error.)

THIS was an action of *assumpsit* brought against the defendants below, (plaintiffs in error), for negligence in conducting a suit in which they had been employed by the plaintiff below, (defendant in error), as his attornies. The jury found a verdict for the plaintiff below, (defendant in error), on the eighth count of the bill filed against the defendants below, which stated in substance, that, in consideration that *Stephen Pige* (the plaintiff below) at the request of *James May* the elder, *William JAMES Norton*, and *James May* the younger, (the defendants below), had retained and employed them as his attornies, to defend a certain action commenced against him, for certain reasonable fees and reward, to be therefore paid by the plaintiff below to the defendants below, they undertook to perform their duty as such attornies for the plaintiff below, in and about the defence of the said action. It was then averred that it was the duty of the defendants below, to have put in special bail in due time for the plaintiff below, in the said action: and assigned for breach, that the defendants below not regarding their duty or promise in that behalf, did not at the return of the writ in the said action, or in due time put in special bail; but wholly neglected so to do: by reason whereof an assignment of the bail bond in such suit was taken, and an action commenced thereon.

Where a bill was filed against three attornies (partners) for negligence, in which they were rightly named, but in entering the finding of the jury on the *postea*, part of the Christian name of one of them was omitted, and the judgment was, that "the plaintiff do recover against the said defendants:"—Held, that such omission was no ground of error.

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v.

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The defendants below brought a writ of error in this Court, and assigned for causes.—*First*, that there was no sufficient consideration to sustain a promise by the defendants below.—*Secondly*, that it was not averred in the declaration, that it was the duty of the defendants below to put in special bail, *according to the course and practice of the Court*.—And *Lastly*, that it was stated in the record, “that the jury summoned to speak the truth of the matters within contained, being chosen, tried, and sworn upon their oath, said, as to the promise and undertaking in the eighth count of the within bill mentioned, that the said *James May* the elder, *WILLIAM Norton*, and *James May* the younger, did undertake and promise, in manner and form as the said *Stephen Pige* had within in that count complained against them, and they assessed the damages of the said *Stephen Pige*, on occasion of the not performing the promise and undertaking in that count mentioned, over and above his costs and charges by him about his suit in that behalf expended, to 200*l.*, and for those costs and charges to 40*s.*:—and as to the several promises and undertakings in the other counts of the within bill contained, the jurors aforesaid, upon their oath aforesaid, said, that the said *James May* the elder, *WILLIAM Norton*, and *James May* the younger, did not, nor did either of them undertake or promise, in manner and form as the said *Stephen Pige* had within in those counts complained against them:—Therefore it was considered, that the said plaintiff do recover against *the said defendants*, as to the promise and undertaking in the eighth count of the said bill mentioned, his damages, costs, and charges, by the jurors aforesaid; in form aforesaid, assessed:”—whereas, in truth and in fact, there is no such person in the said bill, or in the said eighth count of the said bill mentioned, as *WILLIAM Norton*, and therefore there is a manifest discrepancy and variance in the alleged finding of the said jury and the

judgment of the Court: the finding of the said jury being, that *James May* the elder, *WILLIAM Norton*, and *James May* the younger, did undertake and promise in manner and form as aforesaid; and the judgment of the Court being against *the said defendants*, who are within the bill named and called *James May* the elder, *William JAMES Norton*, and *James May* the younger.—Joinder in error.

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v.
FROG.

Mr. Holt, for the plaintiffs in error, was desired by the Court to confine his argument to the last assignment only. He submitted, that the omission of part of the Christian name of *Norton*, in entering the finding of the jury on the *postea*, was fatal in arrest of judgment or in error, as it was a complete variance from the rest of the record, and did not fall within the provisions of the statutes of jeofails, nor could it be amended by the Court. The defect is fatal, as the plaintiffs in error were entitled to a perfect record, and the plaintiff below might have rectified the mistake, or amended, whilst the *postea* remained in his hands; but as it is an error in substance, and after verdict, it cannot now be done, and more particularly so, as the judgment has reference to the finding of the jury on the *postea*; where one of the defendants is improperly named or described, as *William*, instead of *William James*. Although the judgment is against the *said* defendants, it can only be warranted by the finding of the jury, as the word "*said*" is a word of reference, and there is no defendant by the name of *William Norton* in the bill, to which such finding can refer. If execution were taken out, it must follow the judgment, if not, the Court would set it aside, or the plaintiff below might be liable to an action of trespass. There being no day in Court after the finding of the jury, on which the defendants below could plead in abatement, the defect can only be taken advantage of on error; and there must consequently be a *venire de novo*, for the purpose of hav-

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ing a right and proper finding. It cannot be rectified by necessary intendment, as it is apparent on the face of the record. If another action of *assumpsit* were brought against the plaintiffs in error for the same cause, they could not, while the record remains in this imperfect state, plead it as a judgment recovered against them; and if either of the *Mays* should pay the full amount of the damages and costs, he could not maintain an action against *Norton* for contribution, as he would be non-suited if he produced the record in proof of an action in which he had been adjudged to pay damages jointly with *William Norton*, instead of *William James Norton*. The words "*said defendants*" in the judgment, can only be taken to refer to the names of the parties last mentioned in the finding of the jury on the *postea*, and if the omission there be not rectified, execution cannot issue on an imperfect and defective record. In *Arboun v. Willoughby* (a), where the defendant, having two Christian names, was sued by one only, the Court set aside the proceedings; and in *Cole v. Hindson* (b), where a sheriff's officer pleaded a justification in trespass, for taking the goods of *A. C.*, that he took them under a *distringas* against *R. C.* (meaning the said *A. C.*) to compel an appearance, and averred, that *A. C.* and *R. C.* were the same person; it was held, that such plea could not be supported unless *A. C.* appeared in the action, and did not plead the misnomer in abatement. So, here, the finding of the jury cannot be supported as against *William James Norton*, by the name of *William Norton*, and there is no authority to shew that in case a writ of execution should issue against the goods of *William Norton*, that the officer would be justified in taking the goods of *William James Norton*, although they might be one and the same person; for in *Shadgett v. Clipson* (c) it was held,

(a) 1 Marsh. 477.—(b) 6 Term Rep. 234.—(c) 8 East, 323.

that the defendant could not justify an assault and false imprisonment of *A. B.*, by shewing a *latitat* issued against *C. B.*, and averring that it was issued against *A. B.* by the name of *C. B.*, and that they were one and the same person; there being no averment that *A. B.* was known as well by the one name as the other (*a*). So, here, the writ of execution must follow the judgment which was against *William Norton*, as described in the finding of the jury on the *postea*, and not *William James Norton*, as properly named in the bill.

Mr. *Abraham*, *contra*, was stopped by the Court.—

The question in this case does not arise on any proposed amendment, nor is it necessary that any should be made. The defendants below were properly named in the bill, on which alone the finding of the jury could be warranted. The judgment being that the said plaintiff do recover against *the said defendants*, without naming them, which is according to the modern course of pleading; it must be taken to refer to the same persons who were properly named in the bill and throughout the whole of the record, with the exception of the finding of the jury on the *postea*, where the word *James* was accidentally omitted. There was no other *William Norton* than the person described on the record as *William James Norton*, and *the said defendants* in the judgment must be taken with reference to the promise and undertaking in the eighth count of the bill mentioned, as it is particularly so expressed, and in which count all the defendants below were properly named and described; and if the surname of *Norton* only had been adopted in the *postea*, it would have been sufficient, provided it had been preceded by the words "*the said.*" On these grounds, the judgment of the Court below must be Affirmed with costs (*b*).

(*a*) See also *Rex v. Surry, Sheriff*, 1 Marsh. 75.—(*b*) See *De Tas-
tet v. Rucker* (in error), *ante*, Vol. VI. 195. *Longridge v. Brewer*,
ante, Vol. VII. 522.

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Tuesday,
June 17th.

COVENTRY *v.* CHAMPNEYS, Bart.
GORTON *v.* Same.

Where persons were employed by the grantor to raise money by way of annuity, and by the grantees to pay the consideration money over to the grantor, and at the time of the execution of the deeds to secure the annuity, such persons received back from the grantor, or retained, a considerable portion of the consideration money for a debt alleged to be previously due to them from the grantor:—
Held, that this was an illegal retainer, and the Court on motion ordered the securities to be set aside, on the terms of the grantor's paying what might be found to be due to the grantees in respect of principal and interest, although the latter had not received any part of the money so returned or retained, and although it was done without their direction, privity, knowledge, or assent.

IN *Easter Term*, 1822, Mr. Serjeant *Lawes* obtained a rule, calling on the plaintiff *Coventry*, to shew cause why all the several proceedings on a judgment which had been entered up by him against the defendant in this cause, for securing the payment of an annuity, should not be stayed, and why the indenture of annuity of 744*l.* granted by the defendant and his wife to the plaintiff on the 1st *July*, 1818, and the securities whereon it was founded, should not be set aside, and the deed and warrant of attorney delivered up to be cancelled, and the judgment vacated; on the grounds, *first*, that part of the consideration money for which the annuity was granted, had been *retained*; and *secondly*, that the requisites of the statute 53 *Geo. 3*, c. 141, had not been complied with in two instances, *viz.* in not having stated the plaintiff to be one of the persons beneficially interested to receive the annuity, and that the addition and description, or place of abode of one of the witnesses to the warrant of attorney and other securities had not been fully and properly set forth in the memorial, as required by the 2d section of that statute. In support of the first ground, an affidavit of the defendant was produced, which stated in substance, that previously to the year 1818, he had been recommended to Messrs. *Howard & Gibbs* to raise money for him by way of annuity, and that he had accordingly employed them to do so. That in that year, being in want of a further advance, he applied to them for that purpose, when they advised him to pay off his former annuities, and raise a sufficient sum to meet his other occasional wants. That

the Star Life Assurance Company, of which they were managers and directors, would advance him any sum by way of annuity, at the rate of 12*l. per cent.* provided the defendant would pay them (*Howard & Gibbs*) a commission of 9*l. per cent.* for their procuration of the money, and the expences of preparing the deeds. That the Star Life Assurance Company having become first grantees of an annuity from the defendant of 2400*l.*, and one *Fredrick St. John* the second grantee; the plaintiff *Coventry* being one of the proprietors of the Star Life Assurance Company, and intimately connected with *Howard & Gibbs*, who acted as his agents, became the third grantee of an annuity of 744*l.*; but that the consideration money was not paid to the defendant, but was received by *Howard & Gibbs*, who deducted and retained thereout their commission, at the rate of 9*l. per cent.* and placed the remainder to the credit of the defendant on account.

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The witnesses to the warrant of attorney, and other securities were described in the memorial, as *Robert Burton*, of *Langley-Lodge, South Lambeth*, land surveyor; and *James Henry Mann*, clerk to Mr. *Edward Howard*, of *Cork Street, Burlington Gardens*, in the parish of *St. James, Westminster*, in the county of *Middlesex*. This, it was submitted, was an improper addition or description of the place of abode of the latter witness; and the cases of *Darwin v. Lincoln* (a), and *Smith v. Pritchard* (b) were relied on.

A like rule was obtained in the same Term against the executor of the plaintiff *Gorton*, he having died on the 24th *February*, 1822, and his will having been proved on the 3d *May* following.

Both rules stood over until this Term, (*Gorton v. Champneys* having been argued in the last *Michaelmas* Term) for the purposes of the Court's making every possible enquiry as to the facts attending the granting of the annuities, and on a suggestion that there was a probability

(a) 5 Barn. & Ald. 444. — (b) 12 717.

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of the parties coming to an amicable arrangement; but that having proved ineffectual, Mr. Serjeant *Vaughan*, Mr. Serjeant *Pell*, and Mr. Serjeant *Bosanquet* shewed cause on the following affidavits:—

The plaintiff *Coventry* swore, that having a balance of 1200*l.* in the hands of *Howard & Gibbs*, he was applied to by them, to invest it in purchasing part of an annuity of 744*l.* to be granted by the defendant for a sum of 6200*l.*; and that he authorised them to dispose of such balance accordingly; that his share of the annuity was 144*l.*; and that he actually advanced the above sum of 1200*l.* as part of the consideration money; that he lived in the town of *Bedford*, and held a place of trust under Government; and that he had never been connected with *Howard & Gibbs* in money matters, except as before mentioned, and matters of a like nature. That he was not a proprietor of the Star Life Assurance Company, otherwise than as being possessed of four shares of 50*l.* each, out of 2000 similar shares. That he never directly or indirectly interfered in the business of the Company; that he never knew of any commission of 9*l. per cent.* or any other commission being deducted or retained by *Howard & Gibbs*; and that, if they had done so, it was without his knowledge, privity, or consent.

Gorton's nephew and executor swore, that he never knew, nor from a minute inspection of the testator's books or papers could he discover, that the latter was by any means whatever a party or privy to, or that he ever in any way either directly or indirectly participated in charges for commission, or other charges made by *Howard & Gibbs* against the defendant, on account of 5000*l.*, the consideration for the testator's share of the above annuity of 744*l.*; or that he was ever privy to any retainer, deduction, or returning of any of the consideration money, or to any agreement between the defendant and *Gibbs* for that purpose; or that he ever knew of or was privy to any settlement of accounts between *Gibbs* and the defendant,

and that it appeared that the annuity had been paid from *July*, 1818, to *December*, 1819. In furtherance of his affidavit he produced two account books of the testator's before the Lord Chief Justice at the time he was sworn, and particularly referred to the pages containing the account of the transaction in question, where a balance was struck by *Howard & Gibbs*; and on the debit side, they, among other items relating to annuity payments, debited the testator with his full share of the consideration money, for which the annuity in question was granted.

Burton, one of the attesting witnesses, swore, that in 1818 he was employed as the defendant's agent, to raise money by way of annuity, and that he applied to *Howard & Gibbs* as such; that he and *Mann*, who were both present at the execution of the annuity deeds, saw the sum of 6200*l.* duly paid by *Gibbs* to the defendant, and that no part of it was with his or their privity, or to his or their knowledge, returned or repaid by the defendant to *Gibbs* at the time of the execution of the indenture; after which the deponent and *Mann* left the room.

Gibbs deposed, that in *June*, 1818, the defendant, by or through *Burton* his agent in that behalf, applied to him and his partner *Howard*, to raise money for the defendant by way of annuity, and that the latter signed an agreement to pay an annuity of 3960*l.* for an advance of 83,000*l.* That the Star Life Assurance Company advanced 20,000*l.* for an annuity of 2400*l.* That 14,000*l.* more, which was actually raised, proving to be insufficient for the defendant's then wants, 6200*l.* more was advanced by the plaintiffs *Coventry* and *Gorton*, and others. That the said sum of 6200*l.* so paid and advanced to the defendant by the hands of the deponent *Gibbs*, for the purchase of the annuity of 744*l.* was really and *bond fide* paid by him, *Gibbs*, into the proper hands of the defendant, in Bank of *England* notes, of the numbers and dates indorsed on the indenture containing the grant of annuity; and that

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previously to this payment, *Howard & Gibbs* as the agents of the defendant had lent or advanced him considerable sums of money. That after the payment in question, a statement of accounts was made by the defendant and *Gibbs*, and that upon such statement the former was found to be justly indebted to *Howard & Gibbs* for money lent to and paid for the defendant by them as his agents in the sum of 5427*l.* 1*s.* 4*d.*, which sum the defendant thereupon paid to *Gibbs*; but that no part of the above sum of 6200*l.* was deducted or retained by either *Howard* or *Gibbs*.

Under these circumstances, it was submitted for the plaintiffs, that these annuities could not be set aside under the statute 58 *Geo.* 3, c. 141, s. 6, on the ground of an illegal retainer of part of the consideration money, unless such retainer was made for the benefit of the grantees of the annuity, or by their express authority or consent. There can be no doubt but that the whole of the consideration monies were actually and *bond fide* paid or advanced by the plaintiffs to *Howard & Gibbs* in the first instance, for the purchase of the annuities; and there is not even a shadow of pretence for saying that the retainer was made with their privity, or that they were aware that *Howard & Gibbs* had made a deduction of 9*l.* per cent. by way of procuration money; and even if there were any return, it was made to *Howard & Gibbs* alone, and not to either of the grantees, as they positively denied having any participation in the transaction. Both rules are confined to the ground of a *retainer* only, and not to a return, and the charges by *Howard & Gibbs* by way of commission, cannot affect the plaintiffs as grantees of the annuities in the slightest degree, or invalidate the securities as far as it regards them. Besides, *Howard & Gibbs* acted as the agents of the defendant in these transactions and not of the plaintiffs, who consequently ought not to suffer for their acts. But, even admitting that they did act for the plaintiffs, they must be considered as agents, having a limited or restricted authority,

and acting for a particular and specific purpose, viz. for applying the sums advanced to them by the grantees in the purchase of a legal and valid annuity, but the retainer by Gibbs at the time the deeds were executed, was not only contrary to the instructions of the plaintiffs, but was not sanctioned by either of them, nor were they accessory to it; it could not therefore have the effect of avoiding the annuities as to them, although it might be a corrupt and illegal agreement as between the defendant and Gibbs. At all events, the defendant should be left to his remedy at law, and the Court will not interpose summarily to set aside the annuities on an application of this nature, and from which there can be no appeal. An issue therefore ought to be granted, in which the plaintiffs may have the advantage of a jury, before whom all the facts relating to these transactions might be fully and fairly disclosed. The rule "*in equali jure, potior est conditio defendentis*" cannot apply to these cases, as Gibbs acted as the agent of the defendant alone, or at all events beyond the scope of the authority reposed in him by the plaintiffs, so as to make them amenable for his misconduct, as they were merely to secure the annuities, and not render them invalid by an illegal retainer. In *Mootham v. How* (a), where the attorney for the grantor, at the time of the payment of the purchase money, took and kept an unreasonable part thereof, for the expences of preparing and executing the deeds, the Court held it to be no ground to set aside the annuity. Here however, there was no retainer by Gibbs on account of the present annuities, but the defendant was indebted for previous advances made to him by *Howard & Gibbs*. So, whether under all the circumstances the plaintiffs are to be considered as liable for the acts of Gibbs, is a fit question to be determined by a jury, as it embraces a matter of fact, which cannot be fairly got at

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in a summary proceeding of this description; and if these rules are to prevail, it will tend to the ultimate ruin of all those industrious and innocent persons, who have entrusted their property to the care of *Howard & Gibbs*, for the purpose of being laid out or invested by them by way of annuity. The plaintiffs must be considered as standing in the situation of one of those innocent parties, as there was no return or retainer within the meaning of the statute to affect them as grantees; and more particularly so, as they were wholly ignorant of any transaction that took place between *Gibbs* and the defendant at the final adjustment of the accounts between them.

Mr. Serjeant *Lawes*, and Mr. Serjeant *Peake*, in support of the rules, suggested, that although it had been said, that if the annuities in question were set aside, it might lead to alarming consequences to others, yet that it would have an altogether different effect, and tend to the benefit of the public at large. At all events, these applications were made to the equitable jurisdiction of the Court, who were empowered either to set aside the annuities altogether or *sub modo*, as was done in the cases of *Carroll v. Goold* (a), and *Williamson v. Goold* (b), viz. on payment to the grantees of what might eventually be found to be due to them from the defendant in respect of principal and interest, on an account being taken before the Prothonotary. The Court can only be required to grant an issue in cases of doubt or uncertainty, or where their conscience cannot be satisfied by the facts laid before them; but here the Legislature have given them a particular jurisdiction by statute, to relieve grantors of annuities from those pecuniary difficulties in which they may have involved themselves by misfortune or imprudence. The plaintiffs cannot be prejudiced, as it was their duty to have

(a) *Ante*, Vol. VII. 621.—(b) *Ante*, 109.

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been that the monies entrusted by them to *Howard & Gibbs* had been duly and actually paid over to the grantor of the annuity; and as they neglected to do so, they are clearly responsible for the acts of their agents. There can be no doubt but that *Howard & Gibbs* were equally the agents of the plaintiffs as the defendant, for they were specially entrusted by the former to lay out their monies in various transactions by way of annuity, previously to the advance to the defendant, or execution of the deeds in question, and they acceded to the arrangements proposed by them. Whether there has been an illegal retainer or not, must depend on all the circumstances as disclosed by the affidavits, and the relative situation of the parties. It has been no where denied, that *Howard & Gibbs* did not retain 9l. per cent. by way of commission, or that the plaintiffs had not deposited various sums with them for general purposes, independently of any transaction between them and the defendant. Besides which, both the plaintiffs have admitted their authorising this particular transaction. No restriction was imposed on *Howard & Gibbs* as to the terms on which the annuities were to be paid, they were consequently vested with an authority to enter into a contract, whether legal or illegal; and wherever an agency is created, and any transaction takes place in the course of such agency, the principal is bound, although the agent may exceed the authority originally given him; and if such agent be guilty of fraud or malpractice, the principal has his remedy against him. In *Paley's Principal and Agent* it is said that (a) "if a man employs an agent in the commission of a fraud, he is clearly liable for it himself; as if a goldsmith by his servant put off counterfeit plate: and employers are also civilly liable for frauds committed by their servants or agents without their authority, if done in the course of their employment."

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So, if the same agent is employed for two parties, both must be intended to know whatever is in the knowledge of the agent thus mutually entrusted by them; and therefore one who advances money upon a void contract, cannot protect himself by his ignorance of the facts, if the common agent were privy to them. *Doe d. Willis v. Martin (a)*. The case of *Mootham v. How* is in favor of the defendant, as the Court there drew a distinction between a retainer by the agent of the grantor or the grantee of the annuity; and if the party retaining in that case had been the agent or attorney for the latter, it said, that it is quite clear that he must have accounted. The statute 53 Geo. 3, is not confined to the case of a retainer by the grantee of the annuity alone, but extends to illegal retainers generally; neither can any valid distinction be drawn between a return or retainer, as far as regards the present applications, as there has been a clear retainer by Gibbs, who was the authorized agent of the plaintiffs to pay out their monies by way of annuity to the defendant in this particular transaction, whilst the latter acted through the medium of his agent Burton, whom he employed as such for this special purpose. At all events, it is quite clear that the defendant has never been in the full possession of the consideration money for this annuity, but was altogether deprived of it through the machinations of Howard & Gibbs, as nearly the whole of it was returned to and retained by the latter *eo instanti* the deeds were executed by which the annuity was to be secured (b).

Cur. adv. vult.

(a) 4 Term Rep. 66.

(b) The objection as to the defect in the memorial as to the plaintiff Coventry's name not having been stated as a party beneficially interested in the payment of the annuity, was only slightly touched on in the course of the argument; and that as to the misdescription of one of the witnesses was abandoned on the authority of the case of *St. John v. Champneys, ante*, Vol. VII. 384.

Mr. Justice PARK (in the absence of Lord Chief Justice Dallas) on this day delivered the judgment of the Court as follows:—These two cases are so similar in facts and circumstances, and the questions arising in each resemble each other so nearly, that the Court are of opinion that one judgment only is requisite to be pronounced; marking, however, such differences as may exist, to distinguish the one from the other.

The rules in effect call on each of the plaintiffs to shew cause, why the several annuities granted by the defendant Sir Thomas Champneys should not be set aside, and the several deeds by which they are secured should not be delivered up to be cancelled, on the alleged ground, that part of the consideration money was retained. This objection is applicable to both cases, but in *Coventry v. Champneys*, another objection was taken peculiar to itself, viz. that the memorial was defective in having omitted to state the name of the plaintiff *Coventry*, as one of the parties beneficially interested, and by whom the annuity was to be received. Another objection was originally taken in both cases, *namely*, that the place of abode of one of the witnesses was not sufficiently stated or set forth in the memorial, but which was most properly abandoned by the defendant's counsel, as it was impossible to sustain such an objection in either of these cases after the determination of this Court in *St. John v. Champneys*, in the course of the last *Michaelmas Term* (u).

What then are the real facts as deducible from the various affidavits applicable to both these cases, without going through a minute detail of all the particular circumstances which characterize each?—It is sufficient to observe generally, that it appears that an enormous sum of money being wanted by the defendant, an application was made by his own agent *Burton* to Messrs. *Howard & Gibbs*, for the purpose of procuring pecuniary assistance; and it

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is positively sworn and not denied, that besides 12*l.* per cent. as the amount of the interest to be paid on the annuity, an agreement was entered into, by which the defendant was to pay them a commission of 9*l.* per cent. as procuration money, for effectuating the loan. It is also sworn, that a commission at that rate was deducted and retained by *Gibbs* at the very time the annuity deeds were executed; so that, without speaking of other large sums, it appears, according to *Gibbs's* account, that there was in this transaction alone only 778*l.* out of 6200*l.* actually paid or advanced to the credit of the defendant or received by him, the remainder of the consideration money amounting to 5427*l.* being on various pretences retained and kept back. All this is in effect admitted, as it has not been denied by the affidavits of those who were competent to negative or repudiate it, and who alone could have given the Court a full or satisfactory explanation. No account has been rendered, although it was adverted to in the course of the argument, but as it was not annexed to either of the affidavits, the Court could not attend to it consistently with their duty; and if such an account could have been given, it ought to have been exhibited to the Judge at the time such affidavits were sworn, who might have inspected them with attention and scrutiny. But as this was not done, the rule of law *de non apparentibus et non existentibus eadem est ratio*, in strictness most forcibly applies.

Gibbs indeed has sworn, that the whole of the consideration money was really and *bonâ fide* paid by him into the proper hands of the defendant. So, the witnesses who were present at the execution of the deeds, have sworn that they saw the money paid, and that no part of it was to their knowledge returned at that time, or in their presence. But the Court must look at the machinery and iniquity practised in transactions of this nature, and it is impossible not to see but that this is a

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repetition of the numerous subterfuges that of late have been so improperly resorted to. Witnesses were not only necessary to attest the execution of the deeds, but to see the consideration money paid over by the one party, and received by the other; but it appears that as soon as the witnesses saw the deeds executed and the money laid down, they left the room. Why did they not wait and see the defendant put it in his pocket and go away with it, and why did they not make such a statement on oath? The reason is evident, namely, because there was a secret transaction to take place immediately afterwards between Gibbs and the defendant, and accounts and reckonings were then to be gone into, at which no human being but themselves was to be present; and it is not pretended that a moment's interval elapsed between the execution of the deeds, and the return of the money by the defendant to Gibbs, when the accounts between them were adjusted and finally settled. Gibbs in his affidavit most guardedly swears, that after the payment to the defendant, (that must be taken to be immediately after the money was paid into his hands), the accounts between them were settled, and that 5427*l.* was thereupon paid by the defendant to him. This, therefore, puts an end to all those supposed cases which may be put as to a party's going off with the money, and settling the account at a subsequent period; and to which it may be generally answered, that the Court in cases of this description will look at all the facts, and each particular circumstance attending them; and they would ill discharge their duty if they were to act on supposition, and not on proofs which are brought before them on affidavit, and which are not satisfactorily answered or contradicted. On these grounds, we are clearly of opinion that the judgments in both these cases have been attempted to be sustained by ingenious pretences and surreptitious practices, which it was the object of the former and present statutes relative to the granting of annuities to put down and prevent, and

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which have now been in existence for nearly half a century; and if we were to shut our eyes against such practices and subterfuges as these, it would tend to make every indiscreet or profligate young man, or improvident person, (in which latter description the defendant may be classed), a dupe or prey to the most nefarious and wicked practices. In stating thus much, we do not run counter to the decisions of the Court of *King's Bench*, or to former cases determined in this Court; where it has been held, that the clause of the statute 53 *Geo. 3*, now under consideration, is not imperative on the Court to set aside annuities; they will only do so when there is any fraud, pretence, or clear design to keep back the real truth of the transaction, or conceal circumstances or facts which ought to be disclosed to them; but they will not interfere in cases of mere mistake, or inadvertence, or where the circumstances are clearly and satisfactorily explained, as in *Cook & Cheek v. Tower* (a), in this Court; and *Barber v. Gamson* (b), and *Girdlestone v. Allan* (c). Here, however, it has been said, that both the plaintiffs are perfectly innocent, that they have denied all privity or knowledge of keeping back or retaining any part of the consideration money; and that if any money was retained, it was done by *Howard & Gibbs*, who were the agents of the defendant, and not of the plaintiffs; and therefore, that the defendant must look to them only, and be liable for their misconduct, and more particularly so, as these applications were not made to the Court until after the death of *Gorton*. If the charge had been, that he had negotiated this business himself, or been present when the money was paid, and could if alive have given any account of the transaction, it would have been for the Court to consider whether they would have interfered after his death; but this case, as put by the plaintiff's counsel, proceeds

(a) 1 Taunt. 372. — (b) 4 Barn. & Ald. 281. — (c) 1 Barn. & Cress. 61. S. C. 2 Dow. & Ry. 150.

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entirely on the ground that he, *Gorton*, if living, could have given no satisfactory explanation; and the length of time which has elapsed since the annuity was granted, is not sufficient to raise that constructive limitation which the Court have in some instances been disposed to adopt.

Before we proceed to examine the law of the case, it may be proper, in the first place, to see what the facts are, as to the agency. Were then Messrs *Howard & Gibbs* the agents of the defendant or of the respective grantees of the annuities? On the affidavits, the Court do not entertain any doubts as to this point, nor can any unbiassed or unprejudiced person do so. It is satisfactory to draw the conclusion as to this fact, from the affidavits filed on the parts of the plaintiffs themselves.—*Burton* the former, but now discarded agent of the defendant, states, that he was employed as such agent, and that he applied to *Howard & Gibbs* on the defendant's behalf; and *Gibbs* swears in his affidavit, that the defendant by or through *Robert Burton*, his agent in that behalf, applied to him and his partner *Howard*, to raise money for the defendant by way of annuity. It must be also observed, that *Burton* was the general agent of the defendant, he acted in the management of his affairs, and negotiated the whole of the business relative to the annuities in question, as well as those previously granted. But it has been said, that *Howard & Gibbs* were also the agents of the defendant *Sir Thomas Champneys*. This however is contradicted by all the facts. They were clearly and evidently the authorised agents of both *Gorton* and *Coventry*, not only in this particular instance, but in general annuity transactions. The Court are here assuming what they wish to believe, namely, that *Coventry's* affidavit is true. What then are the facts sworn to on the face of that affidavit? That he resided in the town of *Bedford*, for the last twenty-two years, and held a place of great trust and confidence under Government, and that he had never been connected

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with *Howard & Gibbs* in money matters, except as therein before mentioned, and matters of a like nature. Now the matters before mentioned being in regard to the purchase of annuities, if there be any meaning in language, it must of necessity be inferred that they had been before employed or concerned in negotiating annuities for him; and more particularly so, as in the former part of the same affidavit, he (*Coventry*) states, that "*Howard & Gibbs* having in their hands, previously to this transaction, a balance of his, amounting to 1200*l.* to be laid out by way of annuity, he authorised them so to dispose of it." From this statement it is evident that there was a running account between these parties, and if this does not constitute a confidential agency in fact, as between *Howard & Gibbs* and the plaintiff *Coventry*, it can scarcely be contemplated what state of facts will constitute such a relationship.

As against *Gorton*, the fact as to the agency of *Howard & Gibbs*, is far stronger and more convincing and striking. There being no affidavit from him, two books of account, which have never been out of the hands of one of the Judges of the Court, were referred to in the affidavit made by his executor, and marked by the initials of my Lord Chief Justice, as having been exhibited before him, when that affidavit was sworn, and which consequently form a part of this case. On examination we find there is a regular pass book, similar to a banker's, between *Gorton* and *Howard & Gibbs*. That entries for three or four years past, are made therein, respecting the purchase and payment of annuities, with a regular debtor and creditor account; and in one of the pages on the debit side of the account, two annuities besides the present are mentioned and inserted, and on the correspondent credit side, no less than six other annuities are mentioned as having been negotiated by *Howard & Gibbs* for and on account of *Gorton*. Notwithstanding, therefore, all that has been said, it would be absurd for the Court to shut their eyes against so strong and powerful a body

of evidence. Still, however, it has been most strenuously contended, that even admitting that *Howard & Gibbs* were the agents for both these plaintiffs, yet, as the latter had no knowledge of, or were not even privy to the transaction, and from which they individually derived no benefit, they cannot be answerable or amenable for the acts or misconduct of their agents: and it has further been said, that if the Court interferes in these cases, they will erect and constitute a tribunal to themselves, and far exceed the powers with which the law intended them to be invested. In answer to the last part of this remark, it is sufficient for us to say, that the Legislature have cast this power upon us; and that we cannot refuse to exercise it. It has been most usefully and beneficially exercised by Courts of law, ever since the year 1777, when the first statute relative to transactions of this nature was framed and passed. It has been further urged that the 53 Geo. 3, did not mean to avoid or vacate an annuity on account [of a retainer by a mere stranger, or agent to the grantee, unless it were done under his immediate influence, or by his direction. How does that observation apply as far as regards the grantees in both these cases? *Howard & Gibbs* were so far from being strangers to them, that they were their avowed and confidential agents. The plaintiffs, as such grantees, were living at a distance, and left monies in their hands, to be dealt with by them, for the express purpose of purchasing annuities. By the facts which have been brought before the Court, *Howard & Gibbs* are the only avowed and ostensible persons; and the defendant contracted to secure annuities to such persons as should be nominated and appointed by them: and it appears by the affidavits, that the consideration monies were to be subject to certain deductions, imposed and to be made by them, as therein mentioned. If persons purchasing annuities will entrust their concerns and monies to the hands of such persons as *Howard & Gibbs*, to be dealt with by them for a

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particular purpose, there can be no impropriety or hardship in saying, that they must be civilly responsible for the acts of such agents in the course of that employment. We have been pressed to direct an issue for the purpose of making further inquiry into the facts of these particular cases. There can be no doubt but that the Court have authority so to do, but they may, notwithstanding, exercise their own summary jurisdiction when granted to them by the Legislature, except in cases of disputed facts, or contradictory affidavits, where they might not be enabled of themselves to arrive at an immediate or satisfactory conclusion; or might wish to relieve their minds from any perplexity or doubt: in which latter instances, they are empowered to send to the best tribunal for the developement of such facts, *viz.* a jury of the country. Here, however, no such difficulties arise on the facts which have been presented to the Court on the affidavits which have been made in opposition to that of the defendant, on which the above rules were granted; and if we should feel ourselves incompetent to decide in a case circumstanced as the present appears to be, we should be unfit to do so in any other instance, where an application may be made to us to exercise our summary jurisdiction. As to the law of the case, where is the difficulty or novelty of the application? Why have none of those fearful consequences which have now been apprehended, in case these rules should be made absolute, been never anticipated before; when, during the last fifty years, the acts of an agent, where they have amounted to fraud or mal-practice, have been considered and taken as granted to be civilly binding on their principals? It is true the word agent is not to be found in either of the statutes relating to transactions of this nature, yet in the case of the Duke of *Bolton v. Williams* (a), Lord *Thurlow* in the first instance, and Lord *Loughborough* (who was the author and framer of the first of the statutes rela-

(a) 2 Ves. Junr. 138, 152. S. C. 4 Bro. Chan. Cas. 297.

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tive to annuity transactions (a,) afterwards, on the re-hearing of that case, held the grant of an annuity void, and ordered it to be set aside, because the memorial did not set forth the name of the agent as well as the principal, although it was not required by the terms of that statute. The case of the Duke of *Bolton v. Williams*, was afterwards adopted and approved of by Lord *Kenyon*, in *Dalmer v. Barnard*, where his Lordship observed that (b) “if the parties were dissatisfied with the decision in that case, they might have questioned its propriety in the House of Lords by appeal; and that the Lord Chancellor there said, that the statute required, and that it was essential to the justice of the case, that the name of the agent, as well as the principal, should be set forth; that the whole *res gestæ* might appear for the sake of a direction to every quarter from whence information might be collected. That the Legislature foresaw that much mischief was done by effecting transactions of this kind in a private room, where the money was paid by an agent, who received a large premium, while the person actually advancing the money was in an adjoining room; and that if the agent’s name were not disclosed, so that recourse might be had to him to know what really passed, the truth could not be obtained, since, in such case, the principal not being present, could not give all the information.” His Lordship there appears to have anticipated this very case. This therefore shews that all the transactions in a proceeding of this nature should be fully stated, and that the acts of the agent as well as the principal ought to be before the Court, although the word agents is not mentioned in the statutes above alluded to; and more especially so, as it was thought necessary to enquire into their acts, as well at law as in equity, by the previous decisions of *Dalmer v. Barnard* and the Duke of *Bolton v. Williams*. The late case of

(a) 17 Geo. 3, c. 26.—(b) 7 Term Rep. 252.

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Mootham v. How (a), is also of the strongest possible weight, and is of itself a decisive authority, on which the Court may act in the present instance. There, although the Court refused to set aside an annuity, on the ground that the attorney or agent for the *grantor*, at the time of the payment of the purchase money, deducted and kept an unreasonable part of it for the expences of the deed, yet it was most correctly observed by the Court "that the question depended wholly on the retainer, and that if the person detaining had been the attorney of the *grantee*, he must have accounted; but that where he was the attorney for the grantor, it was different." The cases of *Groom v. Champneys**, and *Williamson v. Goold* (b) are to the

(a) 7 Taunt. 596.—(b) *Ante*, 109.

* Mr Serjeant *Laves* in *Michaelmas* Term, 1821, obtained a rule to shew cause, why the judgment which had been entered up in this cause, might not be vacated, and the annuity deeds delivered up to be cancelled, on the ground that Messrs. *Howard & Gibbs*, although stated to be the mere agents of the grantor and grantee, had in fact advanced the consideration money to the defendant out of their own pockets, and had deducted or retained 9*l. per cent.* by way of commission, at the time the annuity was granted: and he relied on the case of *Broomhead v. Eyre* (a) where it was held that a solicitor, who advanced his own money on the purchase of an annuity, was not entitled to any fee for commission, and that if any part of the consideration money were returned to him by the grantor as a charge for such commission, the Court would set aside the annuity deeds.—It was also objected that the memorial was defective in not setting out the names of all the parties by whom the annuity was to be beneficially received, according to the provisions of the statute 53 *Geo. 3*, c. 141.

Mr. Serjeant *Lees* and Mr. Serjeant *Onslow*, in *Hilary* Term, 1822, shewed cause on affidavits, stating that all the consideration money was *bonâ fide* paid to the defendant at the time the deeds were executed, in terms similar to the present case. And Mr. Serjeant *Laves* and Mr. Serjeant *Peake* having been heard in support of the rule, the Court ordered it to be made absolute, on the terms of the defendant's repaying to the plaintiff the sum actually advanced to and received by the former, with interest, at the rate of 5*l. per cent.* from the time of making such advance, the amount of which was to be ascertained by the Prothonotary.

(a) 5 Term Rep. 597.

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same effect, and the Court think that if they did not put the construction on the statute they now do, the parties would have an opportunity of doing the very thing the 53 Geo. 3, meant to prohibit, and that it would virtually operate as a repeal of that statute; for the grantees would take care never to mix themselves up with the transaction, but by living at a distance, and employing such men as *Howard & Gibbs* to invest their monies in annuities, it would put it completely in the power of the latter to commit the most nefarious frauds on improvident and unwary persons in want of pecuniary aid, either through their own misconduct or extravagance; and to protect whom the statute was passed: and its beneficial and salutary objects would be altogether frustrated and defeated, if the construction now contended for by the grantees of the annuities in question were to prevail. Whether the statute be remedial or penal, the Court need not now discuss. It is sufficient to say, that it was intended to prevent and suppress frauds, and in construing statutes of this description, it is a fundamental principle, that they are to be liberally and beneficially expounded, and this distinction is taken by one of our best text writers, *namely*, that (a) "where the statute acts upon the offender, and inflicts a penalty, it is then to be taken strictly: but when it acts upon the offence, by setting aside the fraudulent transaction, there it is to be construed liberally."—On these principles, as well as the reasons before stated, the Court are of opinion that these annuities cannot be supported; and although it has been said, on the one hand, that if they are set aside, the most dreadful consequences may follow, and innocent persons be wholly ruined, yet we think, on the other, (and we have not come to this conclusion without much deliberation,) that our decision will better accord with the object of the Legislature, and be most subservient to the public welfare and the best interests of mankind.

(a) Bl. Com. vol. 1, Page 88.

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This general reasoning extends to both these cases : and as to the second objection which applies to *Coventry's* annuity only, viz. that his name is not inserted in the memorial as a person beneficially interested, there appears to be a considerable degree of nicety and doubt; but having formed the opinion just delivered on the first and principal question, we think it unnecessary to come to any determination on the second.

As the statute has given a discretion to the Court, either to make the rule absolute generally, or on terms, or to discharge it altogether, according to the circumstances of each particular case; we, in the exercise of that discretion, think these cases fall within the second class, and that both rules must be made absolute on the defendant's paying such a sum for principal and interest, as the Prothonotary shall find due to the grantees upon taking an account between the parties, as in the late cases of *Groom v. Champneys*, and *Williamson v. Goold*;—and on these terms, both rules must be made

Absolute.

Tuesday,
June 17th.

In re ISAACSON, CLARK, and BROOKES.

Where an attorney of this Court, having been found by the Prothonotary to be in contempt for allowing another person to practise in his name, who had not been admitted an attorney, the Court ordered the former to be struck off the roll, and the latter to be committed to the Fleet Prison for three months.

MR. Serjeant *Vaughan* having moved for the Prothonotary's report in this matter — Mr. Prothonotary *Watlington* stated, that since the direction of the Court at the commencement of the Term (a), he had examined the books which were then stated to belong to *Brookes*, and that on a careful and attentive inspection, they had tended rather to criminate than exculpate him, and he reported all the parties to be in contempt.

(a) *Ante*, 219.

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Mr. Justice PARK, (Lord Chief Justice *Dallas* not being in Court), addressing himself to *Brookes* and *Isaacson*, (*Clark* being absent from indisposition), observed, that after a full and minute investigation of all the circumstances with which they were charged, the officer had reported them to be in contempt. That it was the bounden duty of the Court to see that justice was purely administered, and not abused by parties who were not qualified to act as its officers or members, or by those who had been guilty of misconduct or mal-practice in the exercise of their duties as such officers. As it now appeared that *Clark* was not an attorney of this Court, it could exercise no jurisdiction over him, and he was consequently entitled to his discharge. But as *Isaacson* had been guilty of an offence which had been prohibited, and marked out by statute (a), the Court felt no difficulty in ordering him to be struck off the roll. With respect to *Brookes*, as it appeared that he had carried on practice as an attorney in the name of *Isaacson*, he not having been admitted as such, he was liable to be imprisoned for any time not exceeding one year (b); but as it appeared that he was already in custody of the Marshal of the Court of *King's Bench* (c), who had sentenced him to be committed for three months; the Court, in the exercise of their discretion, ordered him to be remanded to such custody until the expiration of that period, in pursuance of such sentence; when he was to be handed over to the Warden of the *Fleet* for the further term of three months, so as to complete the period of six months from the first day of his imprisonment under the sentence of the Court of *K. B.* and the rule was ordered to be drawn up accordingly.

(a) 2 Geo. 2, c. 23.—(b) See 22 Geo. 2, c. 46.—(c) He was brought up to this Court under a writ of *habeas corpus*.

1823.

Tuesday,
June 17th.

WILLISFORD, Plaintiff; FAIRBANK, Tenant; GILL, Vouchee.

The exemplification of a recovery may be amended, by transposing the words "an inbound common," from a line where they had been inadvertently inserted, to their appropriate place, they having no meaning without such transposition to effectuate the intention of the parties.

MR. Serjeant *Pell* moved to amend this recovery, which was suffered in *Michaelmas* Term, 1817, by striking out the words "an inbound common," which had been inadvertently and improperly inserted in one part of the exemplification, and where they had no meaning, to the place where they ought to have stood, so as to pass common of pasture for all manner of cattle, and common of turbary and estovers on an inbound common, according to the intention of the parties. The learned Serjeant observed, that the term *inbound common*, meant a common which was not enclosed, but marked out by boundaries; and as the common in question was of an extensive nature, it might be perhaps advisable to state it as an *extensive* inbound common in the recovery. But the Court thought that the transposition as prayed for would be sufficient to answer the purpose required.

The amendment was allowed accordingly.

Wednesday,
June 18th.

WILLIAMSON v. HENRY MICHAEL GOOLD.

Where an annuity was ordered to be set aside on the terms of an account being taken before the Prothonotary, who was to ascertain what sum might

MR. Serjeant *Lens* having yesterday moved that the Prothonotary should report to the Court the balance he had found to be due from the defendant to the plaintiff, as grantee of the annuity, in respect of principal and interest thereon, according to the rule made for that purpose in the last Term (a)—

be due from the grantor to the grantee in respect of principal and interest:—Held, that the latter was entitled to be allowed the fair and reasonable disbursements for the conveyances by which the annuity was secured, but that he could not claim sums paid by him for insuring the life of the grantor, unless there had been a special provision in the deed to that effect.

Mr. Prothonotary *Watlington* stated, that he had ascertained such balance to amount to 915*l*. That a claim was made before him by the plaintiff on the defendant, for the further sum of 370*l*. for the expences of preparing the conveyances by which the annuity was secured, and other disbursements attending it, according to a bill of costs delivered by Messrs. *Howard & Gibbs* as attornies for the parties, and which he had disallowed, as they were not attornies at the time the transaction took place. That a further claim of 700*l*. was made on the defendant, as having been paid for insuring his life, which he (the Prothonotary) had also disallowed, as there was no provision in the deed to that effect.

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WILLIAMSON
v.
GOOLD.

Mr. Serjeant *Vaughan* excepted to the report, and insisted that the plaintiff was entitled to recover from the defendant the fair disbursements and charges attending the conveyances and execution of the deeds by which the annuity was effected and secured; and that it was for the interest of the defendant that his life should be insured, and consequently that the sums actually paid by the plaintiff for such insurances should have been allowed him.

The Court held, that the plaintiff should have been allowed what he might have been equitably entitled to for his disbursements attending the conveyances, such as stamps, attendances, and other charges of a like nature; but that he was not entitled to the sums paid by him for insuring the defendant's life, unless it had been especially provided for in the deed; and that the case of *Burdon v. Browning* (a), was decisive to shew that such charges could not be made.

Mr. Prothonotary *Watlington* having now stated that

(a) 1 Taunt. 522.

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WILLIAMSON
v.
GOULD.

he had looked through the bill of costs, and found the fair disbursements to amount to 240*l.*, which, with the former sum of 915*l.* amounted together to 1155*l.*

The Court, on the payment of that sum, ordered the rule to be made

Absolute.

Wednesday,
June 18th.

LAMBERT v. HODGSON sued with PRINCE.

Where in an action of trespass for an assault and false imprisonment, the declaration contained two counts, and the defendant pleaded, *first*, the general issue; and *secondly*, that he and one J. W. having justified as bail for the plaintiff, in an action then pending, he arrested the plaintiff, to render him in discharge of the recognizance, and detained him in custody until he had satisfied the demand for which the latter action was brought; and the plaintiff replied *de injuria*;

—and it appeared in evidence, that the defendant, in addition to detaining the plaintiff until he had satisfied such demand, caused him to be detained an hour longer, and until he had given a security for the expences incurred by the defendant's becoming bail:—Held, that this was one continuing trespass and imprisonment, and therefore that the plaintiff ought either to have newly assigned or replied the excess, in order to entitle him to recover for the additional detention or imprisonment which was unjustifiable or illegal.

THIS was an action of trespass and false imprisonment. The first count of the declaration stated, that the defendants assaulted the plaintiff, and seized him, and compelled and forced him to go from *Bishop Auckland* to *Stockton upon Tees*, and there imprisoned and detained him without any reasonable or probable cause, for divers, to wit, three days. The second count stated, that the defendants assaulted the plaintiff, and compelled him to go with them to divers places, and there imprisoned and detained him in prison without reasonable and probable cause for three days. The defendant *Hodgson* pleaded, *first*, not guilty. *Secondly*, that he and one *John Wilkinson* having justified as bail for the plaintiff in a certain action or suit, brought against him by one *Hannah Wetherell*, and which action was still depending, he (*Hodgson*) took and seized the plaintiff as he lawfully might, to render him to the custody of the Marshal of the *Marshalsea*, in discharge of the recognizance entered into by him and *Wilkinson*. That the plaintiff wishing to compromise the action, the defendant took him to *Stockton* with his own consent, where

Hannah Wetherell lived, and detained the plaintiff in custody there until he made satisfaction as to the demand for which the action was commenced against him by her; and that on his making such satisfaction, he was discharged from the suit. — The plaintiff replied *de injuria*.

The defendant *Prince* suffered judgment by default. At the trial before Mr. Justice *Bayley* at the last Spring Assizes at *Durham*, it appeared in evidence that the plaintiff, on being taken to *Stockton*, agreed, after having been detained in custody three days, to pay *Hannah Wetherell* 10*l.* by way of satisfaction of her demand in the action so brought against him; and that he gave a warrant of attorney for that purpose. That after it was signed, the defendants took the plaintiff to an inn, where they caused him to be detained for more than an hour longer, and until he gave *Hodgson* his promissory note for 8*l.*, to cover the expences incurred by him and *Wilkinson* in putting in bail and arresting him for the purpose of rendering him in their discharge. That the plaintiff at first resisted that demand, and insisted that *Hodgson* had no right to detain him for such expences; but that he afterwards gave the note as required by *Hodgson*, on which he was discharged.

The learned Judge being of opinion that the second plea did not cover the whole of the trespass as laid in the declaration, a verdict was found for the plaintiff, damages 39*s.* And the jury assessed damages for the plaintiff for sixpence, as against the defendant *Prince*.

Mr. Serjeant *Lens*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside, and a verdict entered for the defendant *Hodgson* instead thereof, or a new trial granted; and submitted, that as the trespass and imprisonment as stated in the declaration, as well as that proved at the trial, was one continuing imprisonment, and consequently forming but one continued trespass, it was covered and answered by the plea, and therefore that the plaintiff should either have replied an excess, or newly assigned as

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to a different and distinct detention or imprisonment after the demand in the action brought against the plaintiff by *Hannah Wetherell* had been adjusted and satisfied. In *Pyewell v. Stow* (a), where the defendant took and detained the plaintiff at the request of his bail, and he replied *de injuriâ*; and it was proved, that the defendant detained the plaintiff for a certain period in expectation of receiving further directions from the bail, who had gone away and left the plaintiff and defendant together; and the latter detained him further until he paid him five shillings; Mr. Justice *Lawrence* said, that "if the plaintiff relied on the excess, he should have stated in his replication that after the bail had discharged him, the defendant detained him until he paid the five shillings;" and Sir *James Mansfield* said, "the plaintiff ought to have newly assigned." That case is expressly in point. So, in *Monprivatt v. The Sheriff of Middlesex* (b), where, to an action of trespass for breaking and entering the plaintiff's house, and staying therein three weeks, the defendant pleaded a justification as to the breaking and entering, and staying in the house twenty-four hours; and the plaintiff replied *de injuriâ*;—and it appeared that the defendant's officers continued in the plaintiff's house *beyond* twenty-four hours, Lord *Ellenborough* was of opinion, that the plea in point of law applied to the whole declaration, and said that "if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment." Although in *Barnes v. Hunt* (c), where, to a declaration for several trespasses in breaking the plaintiff's close on a particular day, and on divers other days, the defendant pleaded that at the said several days he committed the said several trespasses by licence of the plaintiff; and the latter replied, that the defendant of his own wrong, and *without the cause* alleged, committed the said several trespasses, and the plaintiff proved four acts of

(a) 3 Taunt. 425.—(b) 2 Camp. 175 —(c) 11 East, 451.

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trespass, and the defendant gave in evidence a licence which covered two of them only; it was held, that the plaintiff was entitled to recover for the other two, as the evidence did not sustain the justification upon the issue taken by the replication; yet, in that case, there were separate and distinct trespasses committed on several days, and the licence was not co-extensive with the trespasses as complained of in the declaration. Here, however, there was only one continuing assault and imprisonment alleged in the declaration, to which the plea is a complete answer; and as there was no new assignment on the record, under which alone the extension of the imprisonment or further detention could be proved, and by which the continuation of the former trespass and imprisonment might be distinguished, the defendant was entitled to a verdict.

Mr. Serjeant *Peake* now shewed cause, and submitted, that on the face of the pleadings, as well as the circumstances proved at the trial, there had been two distinct trespasses, the first ending with the settlement made by the plaintiff in the action brought against him by *Hannah Wetherell*, and the second commencing by his further detention by the defendant *Hodgson*, until he had satisfied the expences incurred in putting in bail, and detaining him until he had complied with that demand. Even if there had not been two different assaults or imprisonments, there was no necessity for a new assignment, as it can only be required where there is but one count in the declaration; for if there be as many counts as there are assaults, and some of them cannot be justified, the plaintiff may prove those without a new assignment, because 'as to them the defendant will be obliged to plead not guilty (a). So here, as there were two counts, and as according to the facts proved at the trial there were two distinct trespasses, the

(a) 1 Wms. Saund. 299 (a). n. 6. Bull. Ni. Pri. 17. Selw. Ni. Pri. 3d edit. 37, n. 12.

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jury were warranted in finding that there were two imprisonments, the first of which was altogether unconnected with the latter, as the one had ceased before the other commenced.

But the Court were clearly of opinion that there was but one continued imprisonment, and consequently but one continuing trespass. There was no interval between the first and second detention, nor did the parties separate. The plaintiff was in point of fact never discharged, from the time he was first taken, until he had given the defendant the promissory note demanded by him for the costs of putting in bail and subsequent arrest of the plaintiff for the purpose of rendering him in their discharge. He should therefore have newly assigned, in order to entitle him to recover for that part of the trespass or detention which was unjustifiable or illegal, or he should have replied the excess. This case is distinguishable from *Barnes v. Hunt*, as the cause there put in issue by the replication was, that the defendant had not a licence co-extensive with the trespass complained of, and a new assignment could have done no more.

The rule therefore for entering a verdict for the defendant *Hodgson* must be made

Absolute (a).

(a) See *Walsby v. Oakley*, Selw. Ni. Pri. 3d Edit. 37, where it was held, that if there be two assaults, one of which the defendant could justify, and the other not, the plaintiff must newly assign the assault for which the action was brought; otherwise, the defendant will be entitled to a verdict on his justification.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN MICHAELMAS TERM,

IN THE FOURTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDA.

IN the last vacation, died at his house in *Lincoln's Inn Fields*, the Honorable Sir *Alan Chambre*, Knight, formerly one of the Justices of the Court of Common Pleas.

Christopher Puller, Esq. one of his Majesty's Counsel, learned in the law, was appointed to succeed Mr. Serjeant *Blosset*, as Chief Justice of the Supreme Court of Judicature at *Bengal*, and received the honor of knighthood accordingly.

Lord Chief Justice *Dallas* was prevented by indisposition from presiding in Court after the 13th^t *November*, and the continued illness of Mr. Justice *Richardson* compelled him to leave this country for *Malta*, with a view to re-establish his health.

1825.

Thursday,
Nov. 6th.

BERRY v. FERNANDES.

An affidavit to hold to bail, stating that "the defendant was indebted to the plaintiff in a certain sum, for money lent and advanced, and paid laid out and expended by the plaintiff for the defendant, and for money had and received by the defendant to the use of the plaintiff," is sufficient, without alleging that such sums were lent, or paid, or received by the defendant at his request; as such a request must generally be inferred.

Mr. Serjeant Pell applied for a rule *nisi*, that the defendant might be discharged out of custody on filing common bail, on the ground of a defect in the affidavit of debt under which he had been arrested, which was made by the plaintiff, who stated that the defendant was indebted to him in the sum of 1500*l.* and upwards, for money lent and advanced, and paid laid out and expended by the plaintiff for the defendant, and for money had and received by the defendant, to and for the use of the plaintiff;" but it omitted to state that it was "at the special instance and request of the defendant;" and negatived a tender in the usual manner.

The learned Serjeant submitted, that it was necessary to allege in the affidavit, that those monies were lent to or paid for the *defendant at his request*; and he relied on the case of *Durnford v. Messiter* (a), as being the latest decision on this point, and in which the Court of *King's Bench* had determined that an affidavit of debt for money lent, and for goods sold and delivered, and for work and labour, was irregular, if it omitted to state that it was "at the instance and request of the defendant," although it stated that it was "to and for his use, and on his behalf;" and the Court there said, that "money paid to and for the use of the defendant does not necessarily raise a cause of action; because a man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor, and that an affidavit which is to operate in restraint of the liberty of a party, ought to use unequivocal language." Although that decision is contrary to

(a) 5 Mau. & Selw. 446.

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those in the cases of *Eyre v. Hulton* (a), and *Bliss v. Atkins* (b), still, a uniformity of practice in both Courts is highly desirable, and in the case of *Durnford v. Messiter*, the principle on which it was deemed necessary to state the request of the defendant in an affidavit of this nature, was fully gone into and explained.

Mr. Justice PARK (c).—I am of opinion that the affidavit is sufficient in terms, without stating the request of the defendant. Although the recent case of *Durnford v. Messiter* is in direct contradiction to that of *Eyre v. Hulton*, which was decided in this Court; yet the late Lord Chief Justice Gibbs in delivering his opinion in that case, laid down the reasons on which it was founded, and with which I now perfectly agree; for very frequently, where money is received to the plaintiff's use, it is only a conclusion resulting from the construction which the plaintiff, swearing to the best of his judgment, puts upon a transaction, from which he conceives a debt to result, but no request in fact is made by the defendant, but generally arises by implication of law.

Mr. Justice BURROUGH.—There need not in all instances be a request in point of fact; it is sufficient if from the legal result of the transaction such a request can be implied. In cases of a mercantile nature, it is not necessary for a party to swear that money was advanced to or paid by him to a defendant at his request, nor is it requisite to state in an affidavit to hold the latter to bail in an action for money had and received, any actual request by him; it is enough to state that the money was received by him to the use of the plaintiff.

Rule refused.

(a) 5 Taunt. 704. S. C. *nomine Hulton v. Eyre*, 1 Marsh, 315.—
(b) 5 Taunt. 756. S. C. 1 Marsh, 317 (a).—(c) Lord Chief Justice Dallas was absent.

1823.

Friday,
Nov. 7th.

KINDERLEY, Plaintiff; ROBINSON, Deforciant.

A fine may be amended by describing the premises intended to be conveyed, to be situate in the parish of A., instead of the parish of B., where both were originally one parish, and afterwards separated into distinct parishes by act of Parliament.

MR. Serjeant *Vaughan* moved that this fine might be amended, by describing the premises to be situate "in the parish of *St. John the Baptist*," instead of "*St. Michael* in the city of *Coventry*," on an affidavit which stated, that by an act of Parliament passed in the 7 Geo. 2, c. 27, the parish of *St. Michael* in that city was separated into two distinct parishes; the one part retaining the name of *St. Michael*, and the other receiving that of *St. John the Baptist*; and that *Babblack* church was thereafter to be deemed a parish-church, by the name of *St. John the Baptist*; that the premises intended to be passed, were situate in that parish, but by mistake were described to be in the parish of "*St. Michael*," although the fine was not levied until the 19 Geo. 3, (1779), which was forty-five years after the statute was passed.

It was also sworn, that it was the intention of the parties, that all the premises in which the deforciant had an interest in *Coventry* should pass by the fine, and that he was possessed of no other property in that city.

Fiat (a).

(a) See *Lamb*, plaintiff; *Reaston*, deforciant; 1 Marsh. 23. *S. C.* 5 Taunt. 307. *Gill*, plaintiff; *Yeates*, deforciant; 4 Taunt. 708. *Anonymous*. *Ante*, Vol. VI. 590.

Tuesday,
Nov. 11th.

SHERIFF v. JAMES.

An action on the case cannot be maintained

THIS was an action on the case for distraining the plaintiff's cattle *damage feasant*, and impounding them, and for detaining cattle distrained *damage feasant*, where a tender of sufficient amends was made, after such cattle had been impounded.

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detaining them there after tender of sufficient amends. The first count of the declaration stated, that before and at the time of the committing of the grievance by the defendant thereafter next mentioned, the plaintiff was, and still is the owner and proprietor of certain cattle, to wit, two heifers, which, without the knowledge and against the will of the plaintiff, strayed and escaped into a certain close of the defendant, and did damage there to the amount or value of two shillings, and no more: that the defendant thereupon seized and took the cattle in the said close as a distress for the damage, and impounded them;—that the plaintiff immediately after the distress and impounding, and as soon as he had notice thereof, tendered and offered to pay to the defendant a certain sum of money, to wit, the sum of two shillings, in full satisfaction of the trespasses, that sum being sufficient and ample amends for such trespasses, and for all damages for which the defendant had a right to detain the cattle;—that the plaintiff thereupon requested the defendant to permit him to take and lead away the cattle; and that it was the duty of the defendant to have accepted such amends, and to have permitted the plaintiff to have taken and led away the same: yet, that the defendant not regarding his duty in that behalf, but contriving and wrongfully intending to vex, harass, and oppress the plaintiff, wholly refused to deliver back the cattle to him, or permit the plaintiff to lead away the same; but on the contrary thereof, the defendant wrongfully and maliciously demanded an improper and exorbitant sum, by way of amends for the trespasses and damage, to wit, the sum of 10s. 6d. and wrongfully and extortionately refused to permit the plaintiff to take or lead away the cattle, but hath from thence hitherto wrongfully and unjustly kept the cattle impounded; by means whereof they have been greatly injured, and the plaintiff hath been deprived of the use and benefit thereof. There were five other counts stating the damage at less than two

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shillings, and that the plaintiff had made a full and sufficient tender, and ample amends for the trespass, to which was added a count in trover. The defendant pleaded —Not Guilty.

At the trial before Mr. Baron *Hullock*, at the last assizes at *Monmouth*, it appearing that the tender had not been made before the cattle had been impounded, he directed a nonsuit, on the ground that the action was not maintainable, but he reserved the point for the consideration of the Court.

Mr. Serjeant *Peake* now applied for a rule *nisi*, that this nonsuit might be set aside, and a verdict entered for the plaintiff for nominal damages, on the ground that the gist of the action was founded on extortion, or that, at all events, the conduct of the defendant had been improper and malicious; and he submitted, that in the case of an accidental trespass, however trifling the injury might be, if an action of this description were not maintainable, the plaintiff would not only be without remedy, but the party on whose lands the cattle might have trespassed, might make any exorbitant demand he might think proper. He admitted, that the plaintiff could not have replevied, as he had made the tender after the cattle had been impounded; and observed, that he had no other remedy against the defendant, but by this species of action, in which the actual damage which the defendant might have sustained, ought to have been ascertained by the jury, and more particularly so, as the conduct of the defendant had been oppressive. Although, from the case of *Anscomb v. Shore* (a), it seems that no action is maintainable against a person who distrains cattle *damage feasant* for impounding them, instead of accepting a compensation for damages tendered before the cattle were impounded, yet that case was

(a) 1 Camp. 285. S. C. 1 Taunt. 261.

ultimately determined on another point, *viz.* as to the competency of a witness, as being interested in the event of the suit: and here all the facts necessary to support the action appeared on the face of the record, and might have been proved as laid; and as the plaintiff expressly averred, that he had tendered sufficient amends, it should have been left to the jury whether he had done so or not.

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But the Court observed, that a question of this description must have frequently arisen before, and yet no precedent could be found, or had even been alluded to, where an action similar to the present had been brought. The injury done to the defendant by the trespassing of the plaintiff's cattle was uncertain, and it is quite clear that it was too late to tender amends for such injury after they had been impounded. The case of *Anscomb v. Shore* contains a *dictum* directly contrary to the present application: It does not follow that the Judge was not perfectly right in directing a nonsuit, although the facts as stated in the record might have been proved as laid. It does not appear that any malice was imputable to the defendant, as he merely refused to take a sum tendered him by the plaintiff for an injury done by his cattle trespassing on the grounds of the latter, after they had been taken and lawfully impounded.

Rule refused (a).

(a) See *Branscomb (Lady) v. Brydges*, 3 Stark. N. P. C., 171. S. C. 1 Barn. & Cress. 145. 2 Dow. & Ryl. 256.

1823.

Tuesday,
Nov. 11th.

RICHARDSON v. BROWN.

Where the plaintiff brought an action to recover the price of a horse sold under the following warranty, viz. "a black gelding about five years old, has been constantly driven in the plough: warranted:"—Held, that the terms of such warranty applied to the soundness of the horse, rather than to the nature of his employment.

THIS was an action of *assumpsit* brought by the plaintiff to recover the price of a horse sold by him to the defendant.

At the trial before Mr. Justice *Park* at *Guildhall*, at the Sittings after the last Term, it appeared that the horse in question had been sold to the defendant at a public bazaar, and was entered in the sale-book as "a black gelding about five years old, has been constantly driven in the plough—warranted."

For the defendant it was contended, that the plaintiff was not entitled to recover, as he had not shewn that the horse had been constantly driven in the plough; but on proving his soundness, the jury found a verdict for the plaintiff for the price agreed on.

Mr. Serjeant *Pell* now applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, on the ground that the warranty did not apply to the soundness of the horse, but to his having been accustomed to have been driven in the plough; and therefore that it was incumbent on the plaintiff to have proved that fact at the trial.

But the Court observed, that although the terms of the warranty were obscure and doubtful, still that it was more natural to infer that they applied rather to the soundness of the horse than the nature of his employment, and more particularly so as the word *warranted* concluded the sentence, and merely followed those which were descriptive of the work to which the animal had been accustomed: but that, if that word had preceded those of "con-

stantly driven in the plough," it might have made a material alteration in the construction of the sentence.

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Rule refused.

PALMER, Plaintiff; MEREDITH, Tenant; EGGINGTON and another, Vouchers.

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MR. Serjeant *Heywood* moved that this recovery might pass, although the warrant of attorney was not in the usual terms, as it stated that the vouchers put in their place two attorneys therein named, jointly and severally to gain or lose in a plea of *trespass*, instead of a plea of *land*. The learned Serjeant submitted, that those words were synonymous in terms, and that *trespass* might be considered as equivalent to *land*.

Where in the warrant of attorney the words, to gain or lose in a plea of *trespass*, were inserted by mistake, instead of the usual words to gain or lose in a plea of *land*, the Court permitted the recovery to pass, as the word *trespass* might be rejected as surplusage.

But the Court held that the word "trespass" could have no meaning whatever, and that it might be rejected as surplusage; and that as it appeared to have been introduced by mistake, the warrant of attorney might stand simply upon the sentence "gain or lose in a plea."

The recovery was allowed to pass accordingly.

GREEN v. SPEAKMAN.

Tuesday,
Nov. 11th.

THIS was an action of *assumpsit* for use and occupation. At the trial of the cause before Mr. Justice *Bayley*, at the last assizes at *York*, the jury found a verdict for the defendant for 11l. contrary to the opinion of the learned Judge, who expressed his surprise at the result.

Where in an action for use and occupation, the jury found a verdict for 11l. only, but contrary to the opinion of the

Judge, the Court refused to grant a new trial, unless it appeared that such verdict was founded on a mistake of law.

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Mr. Serjeant *Vaughan* now applied for a rule nisi, that this verdict might be set aside, and a new trial granted; on the ground that the jury were prejudiced, the plaintiff being an attorney, and the defendant a farmer; and that as the verdict was directly contrary to the opinion of the learned Judge, it must be considered as a perverse verdict.

But the Court observed that although it was a general rule, that they would not interfere in cases where the damages did not exceed 20*l.*; and that, notwithstanding that rule might be dispensed with on particular occasions, still as the verdict in question did not appear to have been given on a mistake of law, there was no ground whatever for the present application.

Rule refused.

Wednesday,
Nov. 12th.

SWANNELL v. ELLIS and another.

Where in an action on the case against attorneys for negligence, the declaration stated, that the

THIS was an action on the case, and brought against the defendants as attorneys for negligence in conducting the plaintiff's business. The declaration stated that the plaintiff had retained and employed the defendants to conduct an action of ejectment against his then tenant, for the recovery of premises forfeited to him by the tenant's breach of covenant to repair, and that afterwards when the cause came on for trial, it was referred to an arbitrator, who was to decide what repairs were necessary to be done, and the costs of the cause were to abide the event of the award; that the arbitrator was afterwards ready to proceed with the reference, but that the defendants neglected to attend him, whereby the plaintiff was obliged to pay the defendants 60*l.* for his costs incurred in the action of ejectment, which the tenant would otherwise have been obliged to pay; and that he sold the premises for much less, to wit, 100*l.* less than he otherwise would have done. Held, *first*, that it was not necessary in the action against the defendants to produce the lease on which the ejectment was brought; *secondly*, that the jury were not confined to finding 100*l.* as the damages sustained by the plaintiff for the loss on the sale of the premises, as they were laid under a *scilicet*, and proved at the trial to amount to 160*l.* for which sum the verdict was given; and *lastly*, that the declaration was not bad in arrest of judgment, although it was objected that it was not alleged that the plaintiff had sustained any actual loss, or that the arbitrator would have decided that repairs were necessary, or that he would have awarded in favour of the plaintiff in case the reference had been proceeded in.

an action of ejectment against one *Chettle*, he being a tenant of the plaintiff, for the recovery of a certain messuage and premises in the occupation of the former as such tenant, and which the plaintiff claimed to be entitled to, on account of the same being in decay and out of repair, contrary to a covenant in a lease entered into by *Chettle* to the plaintiff, and which lease also contained a proviso for re-entry in case of a breach of such covenant. It was then alleged, that afterwards, at a sitting at *Nisi Prius*, at *Westminster*, it was ordered that the cause should be referred to the arbitration of a surveyor, who was to decide what repairs were necessary, and ought to be done to the premises; and the costs of the action were to abide the event of the award. That the surveyor was afterwards ready and willing to proceed in the reference; but that the defendants, not regarding their duty in that behalf, did not nor would within the time limited for his making his award, prosecute and conduct such reference with due diligence, but neglected to attend the arbitrator for that purpose; whereby he was prevented from ascertaining or deciding what repairs were necessary to be done on the premises; and also thereby the plaintiff was called on and obliged to pay the defendants as his attorneys the sum of 60*l.* as and for his own costs of the cause in the action of ejectment, which his tenant *Chettle* would otherwise have been obliged to pay; and also that by means of the premises continuing in decay, the plaintiff was compelled to sell them for a less sum, to wit, 100*l.* less than he would have done if they had been put into a proper state of repair. The defendants pleaded Not Guilty.

At the trial before Lord Chief Justice *Dallas*, at *Westminster*, at the first sittings in this Term, the jury found a verdict for the plaintiff, damages 160*l.*; but as the lease containing the covenant from *Chettle* to the plaintiff was not produced in evidence, which it was contended for the defendants to be necessary, in order to entitle the plaintiff to

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recover; his Lordship reserved the point for the consideration of the Court.

Mr. Serjeant *Onslow* now applied for a rule nisi, that this verdict might be set aside; and a nonsuit entered, or the damages reduced, or a new trial granted, or that the judgment might be arrested. He submitted in the first place, as to a nonsuit, that the lease was the foundation of the action, as it contained a subsisting covenant by *Chettle* to repair, and the plaintiff's right of entry depended entirely on the terms of the proviso contained in that instrument; and if it had been produced at the trial, it might have appeared that no forfeiture had been incurred, and the jury could only estimate the damage according to the express words of the covenant. The arbitrator could only ascertain to what extent the tenant *Chettle* had bound himself to repair, by inspecting the covenant itself. It was therefore absolutely necessary that he should have referred to the covenants and provisions contained in the lease, as far as they related to the repairs of the premises, and more particularly so, as such covenants are generally modified or qualified, and the plaintiff might have been bound to provide rough timber, by way of a condition precedent, for the purposes of such repairs; and the declaration was framed on the covenant and proviso in the lease, and must depend on them altogether. *Secondly*, the damages ought clearly to be reduced, as it must be assumed that the jury in making their estimate have awarded 100*l.* by way of the loss the plaintiff had sustained on the sale of the premises, in consequence of their not being in repair; as well as 60*l.* for the defendant's bill of costs, which he would have been obliged to pay them, although they had been guilty of negligence; for in *Templer v. M'Lachlan* (a), it was decided, that negligence in the conduct of a cause could not be set up as a defence to an action on an attor-

(a) 2 New Rep. 196.

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ney's bill, unless indeed it was negligence to so great a degree as to deprive the defendant of all possible benefit from the cause; and here, as the costs of the action were to abide the event of the award, the plaintiff had not lost the whole fruits of the suit, and he himself had limited his damages on the sale of the premises to 100*l.* and which sum only he could be entitled to recover; and although it was laid under a *vi-delicet*, it will not make it the less material, as it was alleged by way of special damage. If therefore the jury have found 160*l.* as damages for non-repair, the defendants are entitled to a new trial, as the plaintiff could not recover a greater sum than that laid by him in the declaration, by way of loss on the sale of the premises in question. *Lastly*, the declaration is clearly bad in arrest of judgment, as there is no legal cause of action expressed on the face of it, nor is it shewn that the plaintiff had sustained any actual loss, as it was merely stated in terms, that the defendants neglected to prosecute the reference with due diligence, whereby the arbitrator was prevented from ascertaining what repairs were necessary to be done on the premises, in consequence of which the plaintiff was called on to pay the defendants 60*l.* for his costs. There is no allegation that the arbitrator would have decided that any repairs were necessary, or that he would have awarded in favour of the plaintiff, in case the reference had been proceeded in. The arbitrator might have awarded in favour of the tenant *Chettle*, in which case the plaintiff would have been obliged to pay all costs; but as the reference was not proceeded in, no costs were incurred on the award; and whether the premises were in repair or not, must depend on the terms of the covenant in the lease from the plaintiff to the defendant *Chettle* in the action of ejectment brought against him. For these reasons, the present verdict cannot be sustained.

Lord Chief Justice DALLAS.—Two surveyors were ex-

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amined at the trial, one of whom stated that the premises would have been worth between 500*l.* and 600*l.* more than they were sold for, if they had been in a perfect state of repair; and another fixed the amount of the repairs required at 160*l.*; and it was clearly competent to the jury to estimate what loss the plaintiff had sustained by reason of the want of such repairs, upon the evidence before them.

Mr. Justice PARK.—There does not appear to me to be any ground on which the application for a nonsuit can be sustained in this case, nor, on the whole, can any weight be attached to either of the objections which have been raised, as to the insufficiency of the declaration. It was referred to the arbitration of a surveyor, to decide what repairs were necessary to be done by the tenant *Chettle*. These must be taken to mean tenantable repairs, without referring to the covenants in the lease; and the arbitrator having been prevented from ascertaining the value of such repairs, and consequently from making his award, through the misconduct or negligence of the defendants in not attending him, the plaintiff's cause of action as against them was complete. It is the duty of every occupier of a house to keep the premises in tenantable repair, without any covenant for that purpose; and an arbitrator is competent to decide whether they are in such repair or not, by inspecting them before he makes his award.—With respect to the reduction of damages, it does not appear, that the jury have found 100*l.* for the loss sustained by the plaintiff on the sale of the premises, in consequence of their being out of repair, and 60*l.* as the amount of the defendants' bill of costs incurred by the plaintiff in the original action. It was within their province to give damages for the whole of the injury the plaintiff might prove he had sustained in consequence of the non-repair of the premises, and more especially so as the amount of the loss was laid under a *scilicet* in the declaration, *viz.* that the plaintiff was obliged to sell the premises for a less

sum, to wit, 100*l.* less than he would have done if they had been in repair. The jury were not tied down to the precise sum there stated; but might find to the amount of the loss proved to have been actually sustained, as it was not a material allegation; and my Lord Chief Justice has reported that a surveyor proved that it would cost 160*l.* to put the premises in a fit state of repair. As to the motion in arrest of judgment, there is no objection to the declaration on the face of the record. The defendants appear to have conducted themselves most negligently and improperly, and if they think fit they may have their remedy by bringing a writ of error.

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Mr. Justice BURROUGH.—I am quite clear that there is no ground whatever for ordering a nonsuit to be entered. The only question referred to the arbitrator, was whether the premises were in tenantable repair or not when the action of ejectment was brought. He might have ascertained that fact, with the greatest ease, and without having any reference to the terms of the lease between the plaintiff and *Chettle*, or the covenants therein contained. I also think that the declaration is perfectly good, as stated on the face of the record. The arbitrator being a surveyor, was fully competent to decide what repairs ought to have been done, and it is averred that he was willing to do so, and proceed in the reference, but that he was prevented by the negligence of the defendants. It is quite clear that the plaintiff has sustained a material injury by such neglect, and it appears to me that the jury have decided properly as to the measure of damages he was entitled to recover, and consequently that this verdict cannot be disturbed.

Rule refused.

1823.

Wednesday,
Nov. 12th.

LUDEN v. Elizabeth JUSTICE.

Where a married woman had contracted a considerable portion of the debt for which she was arrested and held to bail, viz. the board and education of a female child, without disclosing her marriage to the plaintiff, and she afterwards acted with duplicity in eluding payment, and eventually went to reside out of the jurisdiction of the Court; they refused on motion to order the bail bond to be delivered up to be cancelled, and a common appearance entered, but left her to plead her coverture.

MR. Serjeant *Pell* on a former day in this Term obtained a rule, calling on the plaintiff to shew cause why the bail bond which had been given in this cause, should not be delivered up to be cancelled, and a common appearance entered for the defendant, on an affidavit made by her, which stated that she was arrested and held to bail at the suit of the plaintiff, on process issued out of this Court for 189l. for the board, lodging, and education of one *Anne Eliza Ballantyne*, whose father is now living, as the defendant believed: that a bail bond was given to the sheriff on the arrest; and that at that time, and when the cause of action accrued, the defendant was married to one *James Justice*; and that it was known to the plaintiff that she was a married woman; she also swore that her husband had died in *Scotland*, since the cause of action accrued, and subsequent to her arrest.

Mr. Serjeant *Cross* now shewed cause, on an affidavit of the plaintiff, which stated that when the child *Ballantyne* was placed at his school in 1814, he did not know that the defendant was a married woman; that she then lived in *Sloane Street*, and had regularly for several years paid the plaintiff for the board and education of the child, representing herself as its only friend. That she exercised the whole and exclusive direction and management in regard to its clothing, education, and pursuits: that it was not till the middle of the year 1821, and after the payment due from the defendant to the plaintiff had become considerably in arrear, that he accidentally discovered that she was a married woman; that on her being taxed with it, she alleged that she had been separated and lived apart from her husband, for a number of years, on a private for-

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tune of her own, settled upon and secured to herself exclusive of and not connected with or subject to the control of her husband: that frequent promises had been made by her to pay the plaintiff the amount of his demand, but that the defendant had left *England* for *France* without doing so; and that she now resided in *Scotland*, out of the jurisdiction of the Court.—Under these circumstances, the learned Serjeant submitted that the defendant should be left to plead her coverture, and that the Court would not assist her on a summary application of this description; and more particularly so, as she represented herself to the plaintiff as a single woman in the first instance, and had since acted with the greatest duplicity in order to avoid the payment of this debt: and he relied on the cases of *De Gaillon v. L'Aigle* (a), and *Burfield v. The Duchesse de Piemie* (b), where the Court refused to discharge the wife, the husband being abroad, for a sum obtained by her on her own account, and although she did not acquire credit by passing herself off as a single woman.

Mr. Serjeant Pell, in support of the rule, relied on the case of *Waters v. Smith* (c), where the Court of *King's Bench* discharged a feme covert on filing common bail, on its appearing that the plaintiff who had arrested her knew that she was a married woman at the time she contracted the debt. So here, the plaintiff was apprised that the defendant was married, before and at the time of the arrest, which was consequently illegal: and in the cases of *De Gaillon v. L'Aigle*, and *Burfield v. The Duchesse de Piemie*, the defendants and their husbands were foreigners; and although here it is sworn that the defendant is at present residing in *Scotland*, she is still entitled to the protection of the Court.

(a) 2 Bos. & Pul. 8.—(b) 2 New Rep. 380.—(c) 6 Term Rep. 451.

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Mr. Justice PARK.—This is an application to the discretion of the Court, and it is necessary to examine all the circumstances attending it, as cases of this description must each depend upon its own peculiar ground, and must be decided accordingly. On the authority of previous decisions, we are of opinion that the defendant in this case must be left to plead her coverture. The case of *De Gailon v. L'Aigle* was far stronger than the present. There the defendant, a Frenchwoman, came over to this country from *France* with her husband, as emigrants. The husband left her here, and went abroad, giving her a power of attorney to transact his business. She afterwards cohabited with another, and traded on her own account with the plaintiff, by whom she was arrested; and the Court refused to discharge her on a common appearance, although the plaintiff appeared to have been acquainted with the fact of her coverture; and *Waters v. Smith* was referred to in support of that application, and Mr. Justice Buller said, (a) "It may happen that coverture may be a good defence. Cases afford no general rule. They turn on nice circumstances. If the sum in question had been advanced on the husband's account, he should have wished the Court to interpose, but that if the wife received it on her own account, she was entitled to no favour." So in *Waters v. Smith*, the Court said, that (b) "when a married woman imposes on a trader, and contracts on her own credit, they would not relieve her in a summary way." In *Pritchett v. Cross* (c), which has not been adverted to in the present case, the defendant was an English woman, and resident in this country; and Mr. Justice Gould there "seemed to disapprove of the summary proceeding by motion, and of taking the fact of coverture from the defendant's affidavit, and he mentioned the case of Mrs. *Baddeley* (d) where the Court were not

(a) 1 Bos. & Pull. 10.—(b) 6 Term Rep. 452.—(c) 2 H. Bl. 17.—

(d) 2 Sir W. Bl. 1079.

satisfied with an affidavit, but put her to plead her coverture; and he said that he had always understood that such was the course both in the *King's Bench* and in this Court." In *Burfield v. The Duchesse de Piennes*, the defendant was a foreigner, and her husband abroad, although she was not separated from him by deed, and had no separate maintenance, nor had she ever represented herself as a single woman; and Mr. Justice *Heath* there observed, that "in *Deerly v. The Duchess of Mazarine* (a), where a verdict was found against the Duchess, the Court refused to relieve her, though her coverture was clearly proved; and that if there were any case in modern times more recognised than another, it was that case." On these authorities, coupled with the circumstances of this particular case, the Court are of opinion that they ought not to interfere in favour of the defendant on this motion, but that she must be left to plead her coverture; and speaking for myself, I rely much on the circumstance of her being now resident in *Scotland*, and out of the jurisdiction of the Court.

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Mr. Justice BURROUGH.—The cases which have been just referred to by my Brother *Park*, are far stronger than the present, to shew that the Court ought not to exercise its jurisdiction on a summary application of this nature.

The indisposition of Lord Chief Justice *Dallas* obliged him to decline giving any opinion.

Rule discharged (b).

(a) 2 Salk. 646. S. C. 1 Salk. 116.—(b) See *Marshall v. Rutton*, 8 Term Rep. 545.

1822.

Thursday,
Nov. 13th.

SCHOLEY V. GOODMAN.

Where, in an action of *assumpsit* by a trustee for the breach of an agreement, by which the defendant and his wife had agreed to live separate, and the defendant had stipulated to pay the plaintiff a certain sum weekly, for the use of his wife, in consideration of which the plaintiff undertook to save the defendant harmless from all debts she might contract on his account;—and the plaintiff sued the defendant to recover sums paid by the former on account of such allowance, and declarations of the wife were received in evidence at the trial, to shew that she had been living in adultery previously to and at the time the payments in question were made; and the jury found a verdict for the defendant generally, as well as on the ground of adultery:—the Court granted a new trial, and it seems that such an agreement is legal, and that the fact of adultery cannot be given in evidence under the general issue, but must be specially pleaded.—*Quære* also, whether such declarations were admissible in evidence, and whether the plaintiff ought not to have had notice of the adultery previously to the commencement of the action?

THIS was an action of *assumpsit*.—The first count of the declaration stated, that before and at the time of making the agreement of the defendant thereafter mentioned, various unhappy and irreconcilable differences had for some time passed and existed, and still continued to exist between him and one *Jane Goodman*, his wife;—that thereupon, on the 12th October, 1821, by a certain agreement then made between the defendant of the first, the said *Jane Goodman*, his wife, of the second, and the plaintiff of the third part, after reciting that such differences had existed between the defendant and his wife, and which being likely to continue they had mutually agreed to live separate and apart from each other for the remainder of their lives; that the defendant had agreed to allow to and for the use of his wife, twelve shillings a-week, upon certain terms therein mentioned, and that the plaintiff had agreed to such payment being made and continued, and to save harmless and keep indemnified the defendant from all further charges or expences on account of the said *Jane Goodman*, his wife:—It was amongst other things agreed by and between the defendant and the plaintiff, that the defendant should, on the *Saturday* in each and every week during the life of his wife, pay or cause to be paid to the plaintiff, or such person or persons as he or they or the wife should mutually name and appoint to receive the same, the said sum of twelve shillings, for the use, benefit, and support of the defendant's wife: provided always, and the true intent of all the parties to the agreement was, that if the defendant should at any time thereafter during the joint lives of him—

self and wife, be sued or prosecuted by her or any person on her behalf, for the payment of any further sum than what was thereby agreed on, or by any person whomsoever, for or in respect of any debt or demands incurred or contracted by or on the part of the wife, during the separation of her and the defendant, or by her means or concurrence; then, and in either of the said cases, it should be lawful for the defendant to deduct from the said weekly allowance of twelveshillings, all and every such sum or sums of money, as he the defendant should be so charged with, or compellable or liable to pay, together with all costs, charges and expences which he should be put to or sustain, by reason of any such action, suit, or proceeding:—and in consideration of the provision so agreed to be paid by the defendant for the use and benefit of his wife, the plaintiff covenanted and agreed that neither she, nor any person or persons by or with her concurrence, should or would, at any time thereafter during the separation between them, in any manner molest, disturb, or visit the defendant without his full and free consent and approbation, nor would institute or prefer any process or other proceedings against him in any Ecclesiastical Court, or elsewhere, for restitution of conjugal rights, nor prosecute or commence any action, process, or other proceedings against the defendant for any other payments or allowances than therein before mentioned, or on account of any debts, contracts, or engagements, which the wife should or might contract or incur during such separation as aforesaid; and that the plaintiff should and would from time to time and at all times thereafter, well and sufficiently defend, keep harmless, and indemnify the defendant from and against all such proceedings, actions, or suits, and all costs, damages, and expences which the defendant should or might pay or sustain for or on account of any such proceedings, actions, or suits, or other matter or thing relating to or concerning the maintenance or support of his wife;—and for the due performance of the said agreement, each of the

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parties bound himself unto the other in the penal sum of 500*l*.—The declaration, after averring mutual promises, proceeded to state, that although the plaintiff and the said *Jane Goodman* had respectively always well and truly performed all things contained in the said agreement on their parts to be performed and fulfilled; and that although from the time of making thereof, continually hitherto, she, the said *Jane Goodman*, with her own will, and with the consent of the defendant, had lived separate and apart from him, according to the tenor and effect of the agreement: and that the plaintiff and she, after the making thereof, had mutually appointed one *William Smedley* to receive the said sum of twelve shillings *per week*, for the use and support of the said *Jane Goodman*, according to the tenor and effect of the agreement; and that *Smedley* had always from thence hitherto been ready and willing to receive the same; and that although the said *Jane Goodman* was still living, and though after the making of the agreement, to wit, on the 25th *May*, 1822, divers large sums of money, of the said weekly sum of twelve shillings, in the whole amounting to 15*l*. became and were due and payable from the defendant, for the use and support of the said *Jane Goodman*, according to the tenor and effect of the agreement;—yet, that the defendant not regarding, &c., but contriving, &c., did not nor would on the day and year last aforesaid, or at any time since, pay the said last mentioned sum of money, or any part thereof, to the plaintiff or *Smedley*, or any other person or persons, according to the tenor and effect of the said agreement, but wholly neglected and refused so to do.—The second count was for board, lodging, and other necessities, found and provided by the plaintiff for the defendant's wife, at his request; to which were added the common money counts. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Dallas*, at *Westminster*, at the sittings after *Michaelmas Term*, 1822, it appeared that the plaintiff was the father of the defendant's

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wife, as well as her trustee, and that he had advanced her half a year's allowance, at the rate of twelve shillings *per* week, according to the terms of the agreement entered into on the separation; which the defendant had refused to pay, and for the recovery of which this action was brought.—The principal ground of defence was, that during the time in respect of which the demand in question was made, the defendant's wife had been living in a state of adultery with one *Pitts*; in consequence of which the defendant had refused to continue the payment of her allowance. In order to prove the adultery, it was sworn that *Pitts* and the defendant's wife lived together in one house, which consisted of four rooms, and slept in one bed; and that they occupied two of the rooms only. And a witness was called, who stated that she had heard the wife make declarations amounting to an acknowledgment of her infidelity to her husband, and her attachment to *Pitts*. The admissibility of this evidence was objected to by the plaintiff's counsel, on the general ground, that the declarations of a wife were not admissible in evidence, either for or against her husband. His Lordship observed, that this case was peculiar in its circumstances, and that he could not find that an objection of this description had ever been raised before; and that it must therefore be decided on principle. He admitted, that although generally speaking, the declarations of a wife were not admissible in evidence, either for or against her husband, as their interests were absolutely the same; yet that in this case, the interests of the defendant and his wife were directly opposite, as they were severed by the agreement of separation. He on the whole thought, that the justice of the case required that the confessions made by the wife, as to her adultery, should be received; and they were accordingly admitted. The jury found a verdict for the defendant generally, and on a question being put to them by his Lordship, they declared that they found the fact of adultery also. His Lordship

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however, reserved the point as to the admissibility of these declarations by the wife, for the opinion of the Court.

Mr. Serjeant *Pell*, in the last *Hilary* Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted; and submitted in the *first* place, that the admissions made by the wife, of her having committed adultery, could not be given in evidence, so as to exonerate her husband from the payment of her allowance according to the terms of the agreement. *Secondly*, that even if they were admissible, it was not proved that the plaintiff was aware or had any notice of the fact of the adultery; and *lastly*, that it should have been specially pleaded, and could not be given in evidence under the general issue. And in support of the latter objection the case of *Field v. Serres* (a) was relied on.

Mr. Serjeant *Vaughan* was about to shew cause in the last Term, when the Court being strongly inclined to think that the adultery should have been specially pleaded on the authority of that case, they suggested the propriety of a new trial, when such a plea might be put on the record; or that the facts should be turned into a special case, as it embraced points of considerable importance, not only as far as regarded the validity and legal effect of the agreement for the separation, but also as to the admissibility of the declarations by the wife, independently of the other evidence, which was sufficient to go to a jury as to the fact of adultery, provided it could be given in evidence under the general issue; and they directed the case to stand over until this Term, in order to give time to the parties to come to some arrangement between themselves, or adopt either of the modes as pointed out by the Court. No arrangement however having been made, Mr. Serjeant *Vaughan* now

(a) 1 New Rep. 121.

shewed cause, and submitted, that the case of *Field v. Serres* was altogether distinguishable from the present, as that was an action of debt on bond brought by a trustee, to recover the arrears of an annuity due to the defendant's wife; and the defendant having pleaded the general issue of *non est factum* only, applied to withdraw it, and plead the facts of the wife having committed adultery, and that she was living in that state when the bond was given. This, however, was an action of *assumpsit* on a mere written undertaking by the defendant to pay twelve shillings per week for the maintenance of his wife, so long as she should live separate from him; and any fact which might operate as a bar to such action, might be given in evidence under the general issue. Adultery by the wife must have the effect of destroying the agreement altogether, and if it had been pleaded, it would be a complete answer to the action. Dower is forfeited by adultery by the express words of the statute of *Westminster 2*, c. 34; and that was admitted by Lord Talbot in *Sidney v. Sidney* (a), although it was there held that an actual jointure was not forfeited by such an act, but that depended on the equitable principle, that it was made before marriage. In *Govier v. Hancock* (b), it was decided that adultery in the wife, under any circumstances but those of consent, absolved the husband from the duty of maintaining her, and consequently that he was not liable for necessaries subsequently supplied to her. So, if the wife elopes, the husband is not bound to maintain her afterwards, or even provide her with necessaries. Here, the defendant was only bound by the terms of the agreement, to make an allowance to his wife so long as she continued chaste, and lived separate from him. Besides, the plaintiff was a mere trustee, and it was not his duty to advance money on account of the wife, who was also his

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(a) 3 Peere Wms. 276.—(b) 6 Term Rep. 608. See also *Morris v. Martin*, 1 Str. 647. *Mainwaring v. Sands*, Id. 706.

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own daughter; and though the action is brought by him, it is in substance the wife's; and the plaintiff was fully aware what defence would be set up to it before it was commenced. The defendant was not cognizant of nor did he connive at the profligacy of his wife: and if she had a spurious offspring, it would be too much to contend that he would have been still liable to support her under the terms of the agreement. Independently of this, however, a Court of law will not recognize an agreement of this description, the object of which is, to carry into effect a separation between husband and wife. It is incompatible with the sound policy of the law; and if admitted, would tend to deny the proposition that a unity of persons subsists between husband and wife, who, while such relationship continues, must be regarded as one individual, and be identified as one and the same person. The case of *Durant v. Titley* (a) is expressly in point, where it was held that a deed made between husband and wife and a trustee, with a covenant by the husband to pay such trustee an annuity, in case the wife *should live* separate and apart from her husband, and should take one of her children to reside with her, was void, as being a deed made in contemplation of a future separation, and therefore contrary to the policy of marriage.

[Mr. Justice *Burrough*.—The agreement in that case was prospective.]

It was equally against the policy of the law whether it were prospective or not, or whether it was made before marriage or after, for a knowledge by the parties that they might enter into such an agreement as occasion might require, would equally facilitate a separation, and operate as if a prospective agreement had been actually made. In *Legard v. Johnson* (b), Lord Chancellor *Rosshyn* seemed

(a) 7 Price, 577.—(b) 3 Ves. 358.

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to be of opinion that instruments of this nature were not to be encouraged, and that Courts of Equity were not competent to give effect to them as against the husband; and in the more recent case of *St. John v. St. John* (a), Lord Eldon intimated a strong opinion that such contracts were not binding, because not permitted by the policy of the law, and that they ought not to be the foundation of an action or suit in equity*. Lord Kenyon, in *Marshall v. Rutton*, emphatically pointed out the difficulty and inconvenience of treating a husband and wife as distinct or different parties; and his Lordship observed, that (b) "if the parties were competent to contract at all, it would then become material to consider how far a compact could be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married; and which would introduce all the confusion and inconvenience, which must necessarily result from so anomalous and mixed a character." Although a married woman cannot bind herself by deed, yet by executing an instrument of this description, she has a discretion to live with her husband or not, which by the policy of the law she would be otherwise unable to do. But even admitting the agreement in question to be legal and valid, and that the wife might sue the defendant through the intervention of the plaintiff as her trustee, the defendant is still entitled to retain his verdict, as the relative situation of husband and wife no longer subsisted between them; and there could be

(a) 11 Ves. 526.—(b) 8 Term Rep. 546.

* All the late decisions in equity, as to the carrying into effect deeds of separation between husband and wife, are collected in *Flather's Index*, and *Supplements*, tit. Baron & Feme. Divs. III. IV. V.

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no reason for excluding the declarations or admissions of the wife as evidence against her husband. The action must be considered as her's, the plaintiff being a mere nominal party, and she must be taken as standing in the situation of a *cestui que trust*, and suing the defendant through the intervention of her trustee. In *Bottomley v. Brooke* (a) it was held, that if a bond be given by *A.* to *B.* in trust for *C.*; in an action on the bond by *B.*, *A.* may set off a debt due to him from *C.*, although the trust did not appear on the face of the instrument. And in *Hanson v. Parker* (b), where, to an action of debt on bond conditioned for payment of money to a third person, and a declaration of such third person was given in evidence, in which she stated that the defendant did not owe her any thing, and he obtained a verdict; such declaration was held to have been properly admitted in evidence, as she was to be considered as the real plaintiff. So, here, as the action was brought by the plaintiff as trustee, for the benefit of the defendant's wife, and she alone was in point of fact and substance beneficially interested, her declarations were admissible in evidence as a *cestui que trust*; and although it might be said that the relationship of husband and wife still subsisted between her and the defendant, yet it was put an end to by the agreement in question, and *sublatâ causâ, tollitur effectus*. If, therefore, adultery be a bar to this action, the declarations of the wife as to that fact were admissible; but independently of those, there was sufficient evidence to go to a jury to establish the adultery, and which of itself furnished a complete answer to the plaintiff's demand.

Mr. Serjeant *Pell*, in support of the rule, relied on the case of *Nurse v. Craig* (c), which was decided subsequently to that of *Marshall v. Rutton*, and where it was held

(a) 1 Term Rep. 621 n. — (b) 1 Wils. 257. — (c) 2 New Rep. 148.

that if husband and wife separate by deed, and the former covenants with the wife's sister to pay his wife, or such person as she should appoint, a certain weekly allowance during their separation, and the wife afterwards lived with her sister, who supplied her with necessaries, and the husband failed to pay the stipulated allowance to his wife, the sister might maintain an action of *indebitatus assumpsit* against the husband for such necessaries. And in *Monroe v. Twisleton* (a), which was an action of *assumpsit* for the board and lodging of the defendant's infant child, and the wife was called as a witness, she having been not only separated but divorced from her husband by act of parliament and married again, Lord *Alvanley* stated the rule to be a broad and general one, and not easily to be broken in upon or shaken, that a wife should not reveal matters of confidence imparted to her by her husband. That was decided on the ground that the confidence which subsisted between husband and wife at the time, should not be violated in consequence of any future separation, and therefore that the wife could not be admitted to give any evidence of what occurred during the marriage; which would have been excluded if the marriage had continued. The general rule, therefore, excluding the declarations of the wife either for or against her husband, is equally applicable, although a separation may have taken place:—and the case of *Nurse v. Craig*, is decisive to shew that the defendant is liable to the plaintiff as a trustee, for the weekly payments advanced by him to the wife; and his undertaking to indemnify the defendant against any debts she might contract, is a sufficient consideration to raise an *assumpsit* to pay the wife's allowance, as stipulated for in the agreement.

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Lord Chief Justice DALLAS.—This case involves many important questions. In the first place, will the law re-

(a) Peake's Evidence, 4th edit. 191. App. lxxxix. S. C. cited 6 East, 192.

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cognize an agreement between husband and wife to live separate and apart from each other. And if so, will adultery by the wife after a separation has taken place, have the effect of annulling such agreement or rendering it void altogether; or will it operate as a forfeiture of the wife's right to allowance thereby stipulated to be paid to her by her husband? The agreement contains no provision as to her continuing chaste; and in case the husband had applied for a divorce, must she not have been allowed alimony during the time the suit was pending? As to whether the declarations by the wife were admissible or not, I gave no opinion at the trial, but treated it as a new and anomalous point; and the case of *Field v. Serres* was not then adverted to. If, however, the adultery had been pleaded, the question is, whether it would furnish a good defence to this action? It is a well known and established principle, that a wife cannot be a witness either for or against her husband, and the same rule applies to declarations made by the wife. I, however, thought at the moment, that if the law would recognize or give validity to the agreement in question, it would operate to destroy the community of interest which previously existed between the husband and wife, or in other terms to create a diversity of interest; and consequently, that the general rule did not apply to this particular case. I however abstained from giving a decisive opinion, but left it expressly for the consideration of the Court. If the instrument be not valid, the plaintiff is seeking to recover through the medium of an unlawful agreement; and is such an agreement to be set up in a Court of Justice to destroy the relationship of husband and wife? On that point I am not at present prepared to give an opinion, but as I admitted the evidence, whether properly or not, I will not now say, I think the best course to be adopted is to send the case down to a new trial.

Mr. Justice PARK.—Whether the declarations of the wife ought to have been received in evidence or not, I am still of opinion that there ought to be a new trial, as evidence *aliunde* may be adduced to prove the fact of adultery. Independently of this, the case embraces questions of weighty consideration, which ought not to be decided on the present motion. It is extremely doubtful whether an agreement of this description can be recognized by law. It must be observed that in *Field v. Serres*, the Court would not allow the pleas of adultery to be put on the record, as if pleaded they would not afford a defence to the action. Another question in this case is, was the plaintiff cognizant of the adultery when the payments in question were made. The defendant undertook to pay him a certain weekly sum for the use of his wife, in consideration of the plaintiff's indemnifying him from all debts she might contract. And it is quite clear that the plaintiff made these payments on account of the wife. In *Trelawney v. Coleman* (a), and *Edwards v. Crock* (b), the question was, whether letters written by the wife to the husband, while living apart from each other, were admissible in evidence; and it was held, that they were, as they were written long before there was any suspicion of the wife's misconduct. Here, however, the declarations were not made until after the adultery. It is most important to consider all those points, which can only be effected by granting a new trial.

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Mr. Justice BURROUGH, I perfectly concur with my Lord Chief Justice and my Brother *Park*, that there ought to be a new trial. The case of *Durant v. Titley* appears to me to apply in principle to the present. The declaration is founded on the breach of an agreement, by which the defendant undertook to pay the plaintiff 12s. *per week*, for

(a) 1 Barn. & Ald. 90. S. C. 2 Stark. N. P. C. 191.—(b) 4 Esp. N. P. C. 39.

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the use of his wife, in consideration of the plaintiff's indemnifying him from all debts which she might contract; and it does not appear that the plaintiff had any knowledge of the adultery at the time the payments in question were made. But as the case embraces several new and important points, I abstain from giving any decisive opinion; and the rule for a new trial must consequently be made

Absolute (a).

(a) This cause was re-tried before Mr. Justice *Burrough*, at *Westminster*, at the Sittings after this Term, when that learned Judge was of opinion that the agreement was legal; and that as the defendant had only pleaded the general issue, the adultery could not be given in evidence, and that the plaintiff should have had notice of it. And he thought that he was entitled to a verdict, which the jury accordingly found—Damages 10*l*. See 1 Carr. N. P. C. 36.

Thursday,
 Nov. 13th.

ROSE v. WILSON.

Where the plaintiff entered a public house after it had been closed for the night, and refused to tell the occupier how he obtained admission, on which he sent for a constable, and charged the plaintiff with felony, on which he was detained in custody two days:—Held, that the occupier was not justified in making such a charge, and consequently, that to an action of trespass for false imprisonment, a plea stating that he was acting in aid of the constable in taking the plaintiff into custody could not be supported. His remedy was by turning him out of the house.

THIS was an action of trespass for an assault and false imprisonment.—The defendant pleaded, *first*,—Not guilty. *Secondly*, that the plaintiff entered the defendant's house and made a great noise and disturbance therein, and continued so doing, on which the defendant gave the plaintiff in charge of a constable, who thereupon took him into custody for the purpose of carrying him before a magistrate, and that the defendant acted in his aid. At the trial before Mr. Justice *Bayley*, at the last Spring Assizes at *York*, it appeared that the defendant kept a public house at *Manchester*, that the plaintiff entered it about midnight, and obtruded himself on a party who had engaged a pri-

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vate room; that he was with difficulty persuaded to leave the house; and that about four o'clock in the morning he had contrived to re-enter, although all the doors had been previously closed; that he refused to give any account by what means he had obtained admission, but conducted himself with insolence; on which the defendant charged him with having feloniously broke into his house, and sent for a constable, to whom he gave him in charge; on which he was taken to the *New Bailey Prison*, where he remained all that day, but was discharged on the following morning, no charge of felony having been substantiated against him.

The learned Judge was of opinion that, under these circumstances, there was no ground for charging the plaintiff with a felony, and that the defendant had exceeded his authority in giving him in charge to a constable, and that his proper remedy was to have turned him out of the house. The jury accordingly found a verdict for the plaintiff, damages 40s.

Mr. Serjeant *Cross*, in the last *Easter Term*, obtained a rule *nisi*, that this verdict might be set aside and a new trial granted; and contended, that as the plaintiff had been clearly guilty of a breach of the peace, by obtruding himself into the defendant's house, the latter was fully justified in sending for a constable. In the *Second Institute* (a), it is laid down, that a watchman may arrest a night-walker by a warrant, and in *Lawrence v. Hedger* (b) it was held, that watchmen and beadies have authority at common law to arrest and detain in prison for examination persons walking in the streets at night, whom there is a reasonable ground to suspect of felony, although there is no proof of a felony having been committed. That case is far stronger than the present, as here the plaintiff had found

(a) Page 52.—(b) 3 Taunt. 14.

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his way into the defendant's house, the doors of which had been previously closed.

Mr. Serjeant *Pell* now shewed cause, and submitted that the defendant had no right whatever to charge the plaintiff with a felony, or cause him to be imprisoned under such a charge. There is a manifest distinction between a person who acts as a peace officer, and an individual who gives another in charge; as the one is protected on the ground of public policy, and is bound to act as a minister of the law on any reasonable charge of crime, whilst the other acts upon his own responsibility (*a*); and here the defendant had his remedy by expelling the plaintiff from his house.

Mr Serjeant *Cross*, in support of the rule, insisted that as the plaintiff had intruded himself into the defendant's house at so unseasonable an hour, and without the knowledge of the latter, he had been guilty of a breach of the peace; and as the doors had been previously fastened, and the plaintiff refused to tell how he got admission, and as he was unknown to the defendant or his family, he had a reasonable ground to suspect that he had entered with a felonious intent; and although it was a public house, it must be considered as a private dwelling during that part of the night when the doors were fastened or closed. At all events, the plaintiff was a trespasser or intruder, as he entered the house against the defendant's will; and as he refused to depart, the defendant was justified in sending for a constable, as if the plaintiff was guilty of a wilful trespass, he was also guilty of a breach of the peace, and if that be so, the defendant was authorized to act in aid of the constable after he had given him in charge.

Mr. Justice PARK.—The plaintiff was only a trespasser.

(a) See *M'Cloughan v. Clayton*, Holt N. P. C. 478.

If he had broken open the door, it would be a different question. The defendant was not justified in calling in a constable, and charging the plaintiff with a felony. His proper remedy was to expel him the house, and not allow him to be taken to prison on a capital charge. Besides, the house in question was a public house, and might have been open as early as four o'clock in the morning; and there is no pretence for saying that the defendant acted in aid of the constable.

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v.
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Mr. Justice BURROUGH.—It appears that the plaintiff had been at the defendant's house the same night, and that he left it shortly after twelve o'clock; and it would be not only against principle, but common sense, to say, that a mere act of trespass can be a foundation for a person to hand over the party trespassing to a constable, on a charge of felony. It therefore appears to me that the learned Judge who tried the cause, was perfectly right in saying that the defendant's remedy was by turning the plaintiff out of his house. This rule therefore must be

Discharged (a).

(a) See *Tulley v. Reed*, 1 Carr. N. P. C. 6.

COHEN v. WATERHOUSE.

Friday,
Nov. 14th.

ON Mr. Serjeant *Vaughan's* opposing the justification of one of the bail in this cause, it appeared that he had taken a house at *Michaelmas* last, near *Fitzroy Square*, which was then occupied by several tenants, and still continued

Where a person had taken a house occupied by several tenants or lodgers, and from one of

whom he had received rent, he is qualified to justify as bail, although he had not occupied the house himself.

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to be so: that he resided with his brother, and had never been in the actual occupation of the house in question; but he stated that he had lately received rent from one of the tenants or lodgers, who occupied the attics; and that he had not yet been able to get the other tenants out of possession. Under these circumstances, the learned Serjeant contended that he was not a housekeeper:—

But the Court held the occupation of the lodgers to be equivalent to an occupation by the bail; and on his swearing to the sufficiency of his property, he was allowed to justify (a).

(a) See 1 Tidd, 7th Edit. 293-4.

Friday,
 Nov. 14th.

LOISADA and Another v. MORYOSEPH.

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiffs in a certain sum for goods sold to him, omitting to add that they had been delivered, is insufficient and cannot be amended.

THE defendant was held to bail on an affidavit made by the plaintiffs, which stated, that he was justly and truly indebted to them in the sum of 365*l.* for goods sold by them to the defendant, and negatived a tender in the usual terms.

Mr Serjeant *Taddy*, on a former day in this term, obtained a rule *nisi* that the defendant might be discharged out of the custody of the sheriff of *Middlesex* on entering a common appearance, on the ground of a defect in the affidavit, as it only stated that the defendant was indebted to the plaintiffs for goods sold by them, and omitted to add, that they had been delivered, and he relied on the case of *Hopkins v. Vaughan* (a), where it was determined that a defendant cannot be held to bail, on an affidavit

(a) 12 East, 398.

stating him to be indebted to the plaintiff in so much for goods *bargained and sold*, without also alleging that they were *delivered*.

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LOISADA
v.
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Mr. Serjeant *Vaughan* now shewed cause, and submitted, that as it was sworn that the goods were sold by the plaintiffs to the defendant, it was sufficient; and that it was not necessary to state that they had been delivered, and more particularly so, as a count for goods *bargained and sold* might be supported without averring the delivery of such goods; and that although the goods in this case might remain in the hands of the plaintiffs, they were still sold to the defendant, and he was liable to pay their amount.

Mr. Serjeant *Taddy*, in support of the rule, relied on *Hopkins v. Vaughan*, where Lord *Ellenborough* said, that "there was a material difference between the case of goods sold and *delivered*, and that of goods only *bargained and sold*. In the one case, the owner having parted with his goods, is entitled absolutely to the price; in the other, where the goods are not delivered, he is entitled only to recover the difference in damages between the value of the goods and the price agreed on." And Mr. Justice *Bayley* added, "there is no reason why the plaintiff should have the security of the defendant's body under arrest, and also retain the security of the goods in his own hands."

The Court observed that a count in *assumpsit* could not be maintained for goods sold, without stating that they had been delivered. That it was incumbent on the plaintiffs to make a sufficient affidavit to hold the defendant to bail, and no attempt to supply it *aliunde*; and that the case of *Hopkins v. Vaughan* had been since confirmed by that of *Bell v. Thrupp (a)*.

(a) 2 Barn. & Ald. 596.

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v.
MORRYSEPH.

Mr. Serjeant *Vaughan* then moved, that the affidavit might be amended on payment of costs, which the Court refused, and the rule for discharging the defendant out of custody was made.

Absolute.

Friday,
Nov. 14th.

DOE, on the several Demises of the Earl of THANET and Others v. GARTHAM, Clerk.

The visitors and feoffees of a free grammar school, who had dismissed the schoolmaster for misconduct, or breach of the regulations of the deed of endowment, cannot maintain ejectment to recover the possession of the school-house, unless they had determined the master's interest therein, by summoning him to appear before them previously to his dismissal, in order that he might be heard in answer to any charges that might be brought against him, and on which such dismissal might be founded.

THIS was an action of ejectment, brought to recover from the defendant, as master of *Skipton* Free Grammar School, in the county of *York*, the possession of the school house and lands belonging to such school. The declaration contained four demises, the first by the Earl of *Thanet*, the second by the Vicar and seven of the churchwardens of the parish of *Skipton*; the third by one *Robert Thomlinson*, clerk; and the fourth by the Earl of *Thanet*, the vicar and churchwardens, and the said *Robert Thomlinson*. Plea — Not guilty.

At the trial before Mr. Justice *Bayley*, at the last Spring Assizes at *York*, it appeared that the legal estate in the school was vested in the Earl of *Thanet*, heir at law of the surviving feoffee or trustee; and that in the deed of endowment the vicar and churchwardens were the visitors of such school. The endowment deed of the school, of the 2 *Edw.* 6, and an attested copy thereof, were produced in evidence for the plaintiffs, by which the master was to have an estate for life, with a power for the visitors to remove him for certain causes of misconduct therein mentioned: and it appeared that the defendant was appointed and licensed head-master of the school in the year 1794; that a meeting of the vicar and majority of the churchwardens was called on the 28th *January* 1822, at which it was resolved that the defendant should be removed from the school; and

a notice was given him in *September* last by them, as visitors, stating that they had thought proper to remove him from his office of schoolmaster; from which situation he was accordingly removed, on the 31st of that month, for an alleged breach of the regulations laid down by the founder for the government of the school; but it was not shewn that the defendant had been summoned before the visitors to shew cause against the charges alleged against him, before his removal;—when it was submitted for him, that as he had been in office more than twenty years, a notice to quit ought to have been given him; or that at all events, he should have been summoned before the visitors, previously to his dismissal; and that their sentence had been improperly passed, as he had not been heard on the accusations with which he stood charged.

The learned Judge was of opinion that the defendant ought to have been summoned before his removal, but he refused to nonsuit the plaintiffs, and permitted the case to go to the jury, who found a verdict for the Earl of *Thanet* as the lessor of the plaintiff, on the first demise in the declaration, subject to the defendant's being at liberty to move to set it aside, and enter a nonsuit, in case the Court should be of opinion that he ought to have been summoned to shew cause before the visitors, previously to his removal from the school.

Mr. Serjeant *Peake*, in the last *Easter Term*, having accordingly obtained a rule *nisi*, on that ground, and submitted that the defendant should have been informed of the causes of such removal, or that at all events he must be considered as a tenant at will, and therefore entitled to six months notice to quit: and in support of the first objection, he relied on the case of *Res v. Dr. Gaskin* (a); where it was determined that a return by a rector to a *mandamus* to

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Dor. d.
Earl THANET,
v.
GARTHAM.

(a) 8 Term Rep. 209.

1823.

Doe, d.
Earl TRANEY,
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GARTHAM.

restore *I. F.* to the office of parish clerk, was insufficient, because it did not state that the party had been summoned to answer to the charge before he was removed.

Mr. Serjeant *Vaughan* now shewed cause, and submitted, that it was not necessary that the defendant should have been summoned before the visitors, as to any mode of defence he might have taken against being displaced from the school; and even if it were necessary, it cannot be looked at by the Court, as this is an action of ejectment, in which the lessor of the plaintiff is entitled to recover on his legal title alone. Whatever therefore may be the equitable rights of the parties is entirely beside the present question. In the case of *Rex v. Dr. Gaskin*, the question turned on the sufficiency of a return to a *mandamus*. So, here, the defendant should either have applied for a *mandamus* to restore him to his situation, or have filed a bill in equity to restrain the proceedings of the visitors; but as he was removed by them it was sufficient, and the Court cannot enter into the validity of such removal in the present action. Although in *Baggs's* case (a), it is stated that though a corporation have lawful authority either by charter or prescription to remove any one from the freedom, and that they have just cause to remove him; yet if it appears by the return that they have proceeded against him without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party, *quia quicumque aliquid statuerit parte inaudita altera, æquum licet statuerit, haud æquus fuerit*, and such removal is against justice and right: yet the principal question in that case was, what acts were sufficient causes in law for the disfranchisement of any citizen or burgess, &c. So, here, the defendant should have applied for a *mandamus*,

when the visitors might have returned the causes for which he had been removed from his office, or he should have applied to the Chancellor for an injunction, as these are the only modes of questioning the decision of an inferior jurisdiction.

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Dor, d.
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Mr. Justice PARK. — I am clearly of opinion that the defendant could not have been legally removed from his office of schoolmaster, without having been previously summoned before the visitors to answer the accusations made by them against him, or the causes on which such removal was founded. That appears to be decisive from the case of *Rex v. Dr. Gaskin*. The defendant, as a schoolmaster, had a freehold in his office, as well as the legal interest under the deed of endowment by which he was elected, although such interest was determinable in case of a breach of the regulations therein contained; he had continued in the uninterrupted enjoyment of the school for more than twenty years before this action was brought, and the only ground on which it was founded was the misconduct of the defendant or breach of the regulations. His interest in the school could only be determinable on such an event. What injury then has the Earl of *Thanet*, as the lessor of the plaintiff, in fact sustained? If the defendant had offended or been guilty of a breach of any of the regulations of the school, he ought to have been summoned before the visitors, to defend himself or shew cause against the charges alleged against him; after which he might have been legally removed, as in the case of *Rex v. Dr. Gaskin*; where the defendant removed his parish-clerk, who applied to be restored to his office by a writ of *mandamus*; and the defendant in his return enumerated several causes, which shewed the indecent and indecorous conduct of the clerk on different occasions, on account of which he was dismissed from his office by the defendant, but the return omitted to state that the clerk had been summoned to answer before he was removed; and Lord

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Doe, d.
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Kenyon there said "if we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice; *audi alteram partem*. That he had no doubt but that the defendant acted from the best motives; and that notwithstanding the decision of the Court against him, he would be perfectly justified in renewing his accusation against the clerk, and in removing him from his office in a more formal manner, if the charge were true; but that every man ought to have an opportunity of being heard before he is condemned." So, here, the defendant ought to have been summoned to answer the charges alleged against him before he was removed from his situation of schoolmaster.

Mr. Justice BURROUGH.—The Court know no just ground for the removal of the defendant from his office. It might, for any thing that appears to the contrary, have been an arbitrary act on the part of the visitors. The defendant, at all events, had an estate of freehold in his office, and he should not only have had a copy of the charges which were alleged against him, but an opportunity of exculpating himself previously to his being removed from his situation.

Rule absolute.

Friday,
Nov. 14.

ALDRITT, Assignee of SKARRATT, a Bankrupt, v. KITTRIDGE.

Where in an **T**HIS was an action of *assumpsit* for goods sold and delivery of *assumpsit* the declaration stated that the defendant was indebted to the plaintiff as assignee of J. S. a bankrupt; for goods sold and delivered to the defendant, and monies lent and advanced to him, and on an account stated between him and the plaintiff, as such assignee, and it was proved that the goods had in fact been sold by the bankrupt to the defendant, with the concurrence of and for the benefit of two former assignees, whose appointment was afterwards ordered to be vacated by the Lord Chancellor, and the plaintiff was thereby appointed a new assignee in their stead: Held, that the action was properly brought and the declaration well framed, although it was objected, either that the former assignees should have been made parties, or the fact of their having been removed and the plaintiff substituted in their place, and that the sale was made previously to his appointment, should have been stated in the declaration.

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v.
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livered. The first count of the declaration stated, that the defendant was indebted to the plaintiff, as assignee of *Skarratt*, a bankrupt, for divers pigs and large quantities of barley, sold and delivered to the defendant by the plaintiff as such assignee. To this was added the common counts, in which the defendant was stated to be indebted to the plaintiff for money lent, paid, and had and received by the defendant to the plaintiff's use, as such assignee; and there was also an account stated between the defendant and plaintiff as assignee as aforesaid. The defendant pleaded the general issue. At the trial before Mr. Justice *Best*, at the last Spring Assizes at *Stafford*, it appeared that a commission of bankrupt was issued against *Skarratt*, in *May*, 1815; that he then occupied a farm, and that one *Pemberton*, and the father of the defendant were appointed his assignees; and that an assignment of his personal property was accordingly executed to them; that they allowed him to continue in possession, and carry on the business of the farm for their benefit, as such assignees; and that the goods were sold by the bankrupt to the defendant, during the time he continued in such possession; that the defendant's father afterwards became insolvent, and was discharged under the insolvent debtors act, on which a petition was presented to the Vice-Chancellor, praying for the removal of the father and *Pemberton*, and an appointment of other assignees in their stead; on which his Honor, on the 7th *April*, 1819, ordered, that a new assignment should be executed to the plaintiff, in which the two former assignees, *vis.* *Pemberton* and the defendant's father, were to join. That shortly after the order, *Pemberton* absconded to *America*, and in 1820 the plaintiff was chosen sole assignee of *Skarratt's* estate, in pursuance of the Vice-Chancellor's order, and an assignment was executed to him accordingly; but that owing to the absence of *Pemberton*, the defendant's father only had executed such assignment. That the plaintiff, in 1821, commenced an action as as-

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in an action brought by the assignees of a bankrupt, might set off a debt due to him from the bankrupt, as the assignees might be considered in point of fact as the bankrupt himself, and as standing in his place.

Mr. Serjeant *Vaughan* was now about to shew cause, when the Court called on Mr. Serjeant *Taddy* to support his rule.

He contended, that as all the transactions between the bankrupt and the defendant, as to the sale of the articles in question, took place when the former assignees were in office, and previously to their removal; and as the plaintiff had then no connection with either of the parties, nor was he interested in the bankrupt's estate, the declaration should have been framed accordingly, and could not be supported as it now stood on the face of the record. The assignment to the plaintiff was not made until many years after the sale by the bankrupt, who was allowed to continue in possession by the permission of the former assignees alone, and he might therefore be considered as having acted as their agent, but not as the agent of the plaintiff. He never accounted with the defendant in his character of assignee, and the consideration for the promise should have been stated in the declaration, according to truth and fact; and although by intendment of law, an assignee may be considered as standing in the place of the bankrupt, yet if a sale be made during the time the preceding assignees were empowered to act, and previously to the vacating of their appointment as such, the succeeding assignee cannot declare that the defendant was indebted for goods sold and delivered to him by the plaintiff as assignee of the bankrupt.

Mr. Justice PARK. — I entertain no doubt whatever in this case. It is quite clear that the Lord Chancellor has power to remove one set of assignees, and direct others to

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be chosen in their stead. The order for that purpose is correct upon the face of it, and by which the two former assignments were directed to be vacated, and the plaintiff was to be appointed a new assignee. That order therefore must be taken to be conclusive. But what are the facts of the case? *Skarratt* became a bankrupt more than eight years since, and two persons were appointed his assignees, one of whom became insolvent, and the other absconded; and the Vice Chancellor, on petition made to him for their removal, and an appointment of others in their stead, ordered that a new assignment should be executed to the plaintiff, in which the two former assignees should join. This could not be carried into effect, as one of them had left the kingdom. The Lord Chancellor afterwards made another order, directing not only that the former assignees should be removed, but that the two previous assignments to them and the plaintiff, as far as they related to the bankrupt's property which had not been disposed of, should be respectively vacated, and that another assignment as to such property should be executed to the plaintiff as such new assignee. The plaintiff having been thus appointed, and the assignment executed accordingly, he must be considered as the original assignee, and as if no others had been appointed under the commission; for when he received his last appointment it had relation back to the time of the bankruptcy, and the former assignments were altogether annulled or vacated by the terms of the last order, and must be taken as though they had never existed. If this be so, the plaintiff had a right to bring his action in the usual mode; and if this had been an action for money had and received, no question could have arisen, and the principle which would apply to entitle the plaintiff to recover in that form of action, is equally applicable to a case of goods sold and delivered.

Mr Justice BURROUGH. — The plaintiff under the cir-

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circumstances of this case must, in contemplation of law, be considered as the assignee *ab origine*, viz. from the time of the act of bankruptcy, and as such has a right to his present claim on the defendant. The Court cannot take notice of the original assignees, or interfere with the intervening appointments which have been vacated. The last order has the effect of affirming the original act of bankruptcy, and the plaintiff was thereby duly appointed a sole and new assignee by the Chancellor himself, as he thereby vacated the order of the Vice-Chancellor altogether, and which must in consequence be now taken as if it had never existed. If the former assignees had never been heard of, and the bankrupt had sold the goods in question to the defendant, the assignee ultimately appointed might have affirmed the sale. So, if the plaintiff can be considered as the assignee *ab initio*, he may affirm the acts of the bankrupt, provided they were done for the benefit of his estate. Although, therefore, the circumstances attending this case appear to be new, there can be no difficulty in saying that the verdict may be supported on the declaration as it is now framed, and this rule must be consequently

Discharged.

Saturday,
Nov. 15th.

WELLS's Bail.

Time can only be given to add and justify another person as bail, where the party originally consenting to justify is prevented from attending by an unforeseen accident, or an act of God.

Mr. Serjeant Lawes applied for leave to justify one of the bail in this cause, and for time to add and justify another, on an affidavit, which stated that they had both consented to become bail; but that one of them had called on the defendant last evening, and then informed him for the first time, that he would be prevented from attending to justify this morning, in consequence of a covenant or agreement entered into between him and his partner at the time of the

partnership, by which they had both stipulated not to become bail.

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But the Court referred to the case of *Watson's* bail (a), where it was held that an application of this nature could only be attended to in cases of an unforeseen accident, or where the parties were prevented from attending by the act of God.

Bail rejected.

(a) *Ante*, Page, 208.

HOLMES v. HODGSON.

Saturday,
Nov. 15th.

THIS was an action of trespass. The declaration stated that the defendant broke and entered the plaintiff's close, and broke open the gates, and destroyed the locks thereof, and also broke and entered the plaintiff's house, and there seized and took divers goods and chattels of the plaintiff's, to wit, one hundred articles of household furniture, and one hundred articles of wearing apparel, without describing their nature or quality. The defendant was bound by an order of Lord Chief Justice *Dallas* to plead issuably, rejoin gratis, and take short notice of trial, but afterwards demurred generally to the whole declaration. The plaintiff considering that this demurrer was not an issuable plea within the terms of the order, signed judgment as for want of a plea.

Where the plaintiff declared in trespass that the defendant broke and entered his close and broke open the gates thereof, and also broke and entered his house, and there seized and took divers of the plaintiff's goods and chattels, to wit, one hundred articles of furniture, and one hundred articles of wearing apparel, without describing their nature or quality; and the defendant being under a Judge's order

Mr. Serjeant *Onslow*, on a former day in this Term, obtained a rule nisi, that this judgment might be set aside for irregularity, with costs, and produced an affidavit of

to plead issuably, demurred generally to the whole declaration, and the plaintiff signed judgment as for want of a plea, the Court ordered it to be set aside with costs, as the demurrer went to the substance of the declaration, the goods taken having been insufficiently described therein.

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HOLMES

HODGSON.

merits, and that the defendant had a good defence to the action.

Mr. Serjeant *Vaughan* now shewed cause, and submitted, that as the only objection to the declaration was, that the goods taken by the defendant were not sufficiently specified therein, the demurrer should have been special, and confined to that part only, and not have been general to the whole of the count; for if the plaintiff had gone down to trial, he might have been entitled to judgment for breaking and entering his close and destroying his gates, and that consequently the damages might have been severed, as he had received two distinct injuries, the one relating to his land, and the other to his goods: and he relied on *Playter's case* (a), where in an action of trespass for breaking and entering the plaintiff's close and taking his fish, the declaration was held bad in arrest of judgment, on the ground that the nature or number of the fish was not stated therein; yet it was there resolved that the damages ought to have been severed, viz. so much for the fish, and so much for breaking the close, and that then the plaintiff would recover damages for the injury done to his close, with costs (b). So, here, the demurrer should have been confined to that part of the declaration which related to the taking of the plaintiff's goods.

Mr. Justice PARK.—It is quite clear, that a demurrer which goes to merits or the substance of the action is to be considered in the same light as an issuable plea. If, therefore, the demurrer in question will operate as a bar to the plaintiff's right to recover in this action, it falls within the meaning of the order of my Lord Chief Justice. It appears to me, that it goes to the substance and not to the mere form of the declaration; and this rule must be consequently made absolute.

(a) 5 Rep. 34 b. — (b) See also 2 Wms. Saund. 74, n. 1.

Mr. Justice BURNOUGH.—I am clearly of opinion that this declaration is bad in substance, and if it be so in part only, the defendant has a right to avail himself of it by a general demurrer. A declaration in trespass for taking goods, must set out their nature and quality with the same precision as in an indictment for taking them feloniously; and there is no doubt but that if they had been set out in such an indictment as they are in the present case, it would have been bad. This is distinguishable from *Playter's* case, as there the plaintiff had obtained a verdict. If the cause of action as to breaking and entering the plaintiff's close had been struck out of the declaration, there can be no doubt whatever but that the remainder of the count as to the goods would be bad; and a count which is bad in part as to substance, may be taken advantage of on general demurrer.

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Rule absolute.

STOCKHAM v. FRENCH.

Monday,
Nov. 17th.

Mr. Serjeant *Pell* applied for a rule, calling on the defendant to shew cause why the rule for the allowance of bail in this case should not be set aside, on the ground of their having committed wilful and deliberate perjury, when they came up to justify on *Saturday* last; the 15th instant. On their being opposed and examined by the learned Serjeant on that day, as to their property and responsibility, one of them swore that his name was *James Owen*, as described in the bail-piece; and on being asked whether he had ever been in custody for debt, and remanded by the Insolvent Debtors Court, he answered

The Court will not set aside a rule for the allowance of bail, on affidavits disclosing that they had been guilty of gross and wilful perjury when they came up to justify, although the application for that purpose was made on the day following that on which the of-

fence was committed; the plaintiff's only remedy is by indictment against the bail, unless the defendant himself was privy to, or appeared to be implicated in the transaction.

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 v.
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that he had not, and that he had never been imprisoned or insolvent. The other stated his name to be *James Hough*, and he swore that he had never been imprisoned or in custody. On which they were allowed to justify, and the rule for allowance was drawn up accordingly.

The learned Serjeant now produced the affidavit of an attorney who was in Court at the time the bail came up to justify, and who stated that he knew *Owen*, that his Christian name was *John*, and not *James*; that he was arrested in *January*, 1821, when he was taken to the *White Cross Street Prison*; that he afterwards petitioned the Insolvent Debtors Court for his discharge, which was opposed by his creditors on the ground of fraud, and that the Court ordered him to be remanded for two years. He also produced an affidavit as to *Hough*, which stated that he was in custody for debt in *White Cross Street Prison*, in the year 1819, from which he was subsequently discharged.

Under these circumstances, it was submitted, that although it was a general rule, if bail swear falsely, the only remedy is by an indictment for perjury; yet that in so gross and aggravated a case as the present, the Court would exercise their authority, and proceed summarily as for a contempt of Court. In an *Anonymous* case in this Court (a), where two persons put in bail in feigned names, the Court ordered them and the attorney to be set in the pillory; and here, as *Owen* had justified under a fictitious Christian name, he falls expressly within that case; and in *Brown v. Gillies* (b), the Court of *King's Bench* ordered the rule for allowance of bail to be discharged with costs, to be paid by the defendant, on an affidavit that one of the bail had perjured himself on his justification, in swearing that an action in which he had been bail, had been compromised. Although in the late case of *Shee v. Abbott* (c), this Court held that the plaintiff's only remedy was by

(a) 1 Stra. 384.—(b) 1 Chit. 372.—(c) *Ante*, Vol. V. 521.

indictment; yet there the application was not made until the term following that in which the offence was committed; but here the plaintiff came at the first possible moment; and the rule ought to be granted on principle, and the plaintiff not compelled to resort to an indictment for perjury; as in all probability the debt due to him from the defendant will be wholly lost, and the bail will not be worth the trouble or expense of pursuing.

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STOCKHAM
v.
FRENCH.

Mr. Justice PARK.—The application for a rule to set aside the allowance of bail in this case is founded on an *ex parte* statement, but which nevertheless cannot fail to excite our astonishment. The answers given by the bail to the questions so pointedly put to them by my Brother *Pell*, when they came up to justify, were so direct and positive, that we could not refuse their justifying. But the effect of the present application, if granted, would tend to operate on the defendant alone; and there is nothing disclosed in the affidavits, nor has it even been intimated, that there is any ground to implicate him in the transaction, or even to call his conduct in question. He alone could be served with the rule and not the bail; and it must be ultimately decided without our hearing whether they had any answer to the charges alleged against them. I do not clearly see on what ground the Court of *King's Bench* acted in the case of *Brown v. Gillies*. Although here, both the bail have been guilty of a great contempt of Court, yet in order to warrant a commitment for such contempt, it must take place at the time, and when the parties are still in view of the Court. We have now no authority to bring the bail before us, nor have we any power over them; and the case of *Shree v. Abbott* appears to me to be a decisive authority to shew that the plaintiff's only remedy is by indicting them for perjury.

Mr. Justice BURROUGH.—Whenever a party subjects

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himself to a charge of perjury, the only remedy of the complainant is by indictment. Here, the charge is made against the bail only, and the defendant does not appear to have mixed himself up with them, or been in any shape a party to their misconduct. The plaintiff's only remedy therefore is to proceed by indictment against them, when they may have an opportunity of refuting the charges now alleged against them; and it would be too much for us to interfere on a motion of this nature, which would affect the defendant alone, without bringing his bail before the Court.

Rule refused (a).

(a) See *A'Becket v. —*, 5 Taunt. 776.

Tuesday,
 Nov. 18th.

CROFTS v. PICK.

An officer of the Insolvent Debtors Court, who has been appointed to, and accepted the office of provisional assignee under the insolvent debtor's act, 53 Geo. 3, c. 102, must by such assignment be taken to have consented to accept the estate and other property of the insolvent, within the meaning of the 18th section of that statute, as he has no discretion to refuse such assignment.

THIS was an action of replevin. The defendant avowed for rent in arrear, on the demise of a certain dwelling house and premises from him to the plaintiff. The plaintiff pleaded in bar, *first, non tenuit*; and *secondly*, that after the demise in the avowry mentioned, and before the said time when, &c. he the plaintiff had taken the benefit of the Insolvent Debtors act, and that the messuage and premises in question, on which the distress had been levied, as well as all his other property, had been duly assigned, and conveyed to one *Joseph Jeyes* as a provisional assignee, for the benefit of the plaintiff's creditors.—Replication, that *Jeyes* did not before or after the demise, or before or since the said time when, &c. or before or after the rent became due and unpaid, consent to accept the plaintiff's right and title in the said messuage and premises, and on which issue was joined.—At the trial, before Mr. Baron *Graham*,

at the last assizes for the county of *Surrey*, *Jeyes*, an officer or clerk of the Insolvent Debtors Court, on being called as a witness, proved that he had consented to take on himself the office of provisional assignee, and that he had accepted the conveyance of the plaintiff's property as such assignee; but that he was unacquainted with the nature of the premises in question, and that he merely held a general conveyance of the plaintiff's property in his capacity of provisional assignee. The learned Baron expressing some doubt whether the mere retention of the conveyance of the plaintiff's property by the assignee, was a sufficient acceptance within the terms of the 18th section of the Insolvent Debtors act, 53 *Geo.* 3, c. 102 (a), directed the jury to find a verdict for the plaintiff, reserving leave for the defendant to move to set it aside and have a nonsuit entered, in case the Court should be of opinion that such conveyance of the property to the assignee did not amount to an acceptance.

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GROVE
v.
PICK.

Mr. Serjeant *Pell*, on a former day in this Term, accordingly applied for a rule *nisi*, and submitted, that as, by the terms of the statute, the estate and effects of an insolvent are only vested in the person or persons to whom the same shall by the order of the Court be directed to be conveyed and assigned, in case such person or persons *shall consent* to accept the same, a mere conveyance to a provisional assignee, who takes upon himself that office as

(a) By which it is enacted, that "all the estate, right, title, interest, and trust of every prisoner, who shall be discharged by virtue of that act, of, in and to all the real estate as well freehold as copyhold or customary, and of, in and to all the personal estate, debts and effects of every such prisoner, shall immediately from and after the order of such Court as aforesaid for the discharge of such prisoner be, and the same are thereby vested in the person or persons to whom the same should by the order of the said Court be directed to be conveyed and assigned as aforesaid, in case such person or persons *shall consent* to accept the same."

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imposed by the Court, without any further act of concurrence, or recognition of the property of the insolvent, or disposition or management of it, is not such an acceptance of the premises in question, as to bring him within the reach of the plaintiff's plea in bar; and it was incumbent on the plaintiff to have shewn that there had been an absolute consent by the provisional assignee to accept his property or not, either by the proceedings in the Insolvent Debtors Court or otherwise; and in *Copeland v. Stephens (a)*, it was held that the general assignment of a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment.

The Court observed, that they felt but little difficulty on the question, but ordered the rule to be suspended until they had ascertained the opinion of the learned Baron who tried the cause.

Mr. Justice PARK now observed, that the only point arose on the construction of the 18th section of the statute 53 Geo. 3, c. 102, (the Insolvent Debtors act,) viz. as to whether an officer of that Court, who had taken upon himself the office of provisional assignee, was bound to act as such. The replication alleged that he did not consent to accept the plaintiff's right and title in the premises in question, or in other terms, that he did not accept the trust. But the Court are all clearly of opinion that a public officer, by accepting a trust, is bound to do all acts connected with such trust in his capacity as such public officer, and therefore that a provisional assignee, duly appointed by the Insolvent Debtors Court, had no right to exercise a discretion; and as he could not refuse the assignment, he must be taken to have consented

(a) 1 Barn. & Ald. 598.

to accept the property of the insolvent so assigned to him. It is only necessary further to add, that the learned Baron who tried the cause was of that opinion, and now concurs with the Court. There is consequently no ground to disturb the verdict found for the plaintiff, and the application for that purpose must be

Refused.

ALEXANDER v. DIXON.

Wednesday,
Nov. 19th.

MR. Serjeant *Vaughan*, on a former day in this Term, obtained a rule nisi, that an attachment of contempt might be issued against one *John Creighton*, for his not attending at the trial of this cause as a witness, pursuant to a *subpœna duces tecum* served on him for that purpose. He founded his motion on an affidavit, which stated that *Creighton* was personally served with a copy of the *subpœna* on the 3d July last, and that he was at the same time paid one guinea, by way of conduct money and expences in the going to and returning from the *Guildhall, London*, as a witness on the part of the plaintiff on the trial of this cause; and that the plaintiff could not safely proceed to trial without his testimony: that on the 4th July, the cause was called on for trial, and that *Creighton* did not attend as a witness, in consequence of which the plaintiff was obliged to withdraw his record.

Where a person was served with a *subpœna duces tecum* on the 3d July, by which he was required to attend the trial of a cause in *London*, on the 2d of that month:—Held, that as a particular day was inserted therein, which had passed before the service, the Court could not interfere by granting an attachment for the non-compliance with the terms of the *subpœna*, although it was tested properly on the last day of the preceding Term, and the sittings did not commence till the day on which the *subpœna* was dated.

Mr. Serjeant *Taddy* now shewed cause, on an affidavit which sated that the *subpœna* served on the witness was dated on the 18th June, requiring his attendance at the trial on the 2d July following; that he was not served until the 3d, and that no notice was then given him that the cause

the *subpœna*

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ALEXANDER
v.
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had not been tried. Under these circumstances, he submitted that the witness was not bound to attend, pursuant to the *subpœna*, as he was thereby required to attend at *Guildhall*, on *Wednesday*, the 2d *July*, whereas it appeared that he was not served until the 3d, and consequently that such service must be considered as a nullity.

Mr. Serjeant *Vaughan*, in support of the rule, observed that the legal effect of the *subpœna* must be taken to operate throughout the whole of the sittings after the last *Trinity* Term, and more particularly so, as it was dated on the 18th *June*, which was the last day of that Term, and required the attendance of the witness on the 2d *July* following, which was the first day of the sittings in *London* after such Term: and he assimilated this case to the common case of process, which might be served on a party after the teste indorsed upon it.

Mr. Justice PARK.—At the time the witness was served with the *subpœna* on the 3d *July*, it should have been stated to him that although his attendance was thereby required on the preceding day, yet that the cause had not been tried; and that it would therefore be necessary for him to attend the sittings until it was called on for trial. Although the teste of the *subpœna* was proper, being on the last day of the last Term, yet the witness was only required to attend on a particular day, which was previous to the service: besides, it appears to have been a *subpœna duces tecum*, and I am therefore of opinion that the service was inconsistent with the day on which the witness was required thereby to attend.

Mr. Justice BURROUGH.—This being a motion for an attachment for a contempt of the process of the Court, the party applying should have proceeded further, and stated

that the witness had notice that the cause had not been tried when he was served with a copy of the *subpoena*. He was thereby required to attend the trial on a day which had passed; and in the case of trials at *Nisi Prius* in the country, a party is required to attend at the assizes generally. So, here, in order to render the witness *subpoenaed* liable to an attachment, it should have been expressed on the face of the instrument, that he was required to attend at the sittings after the last *Trinity Term*; but as a particular day only was inserted therein, the Court cannot interfere.

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ALEXANDER
v.
DIXON.

Rule discharged without costs.

HARRIETT NEAVE, Executrix, v. Moss.

Wednesday,
Nov. 19th

THIS was an action of replevin, for taking the plaintiff's goods. The defendant made cognizance as bailiff of *Henry Meux & Co.*, and averred that one *Robert Neave* in his lifetime, now deceased, from the 25th *December*, 1814, until the death of one *John Newberry* on the 30th *August*, 1815, held the messuage or premises in which, &c. as tenant thereof to *Meux & Co.* and *Newberry*, by virtue of a certain demise theretofore made, at the yearly rent of 70*l.*, payable quarterly; and that after the death of *Newberry*,

Although in general a tenant cannot dispute his landlord's title in an action of replevin, or use and occupation;—he may yet, under particular circumstances, shew that it has expired. Where, therefore, a tenant

for life having a power to lease for 21 years, granted a lease for 55 years, which, after several mesne assignments got into the possession of the defendants, who, after the death of the tenant for life, under-let them to the plaintiff's father, and in the following year the person next in remainder, after giving the father and defendants notice to quit, granted a new lease to the father at an increased rent, which was paid for more than six years; at the expiration of which period, the defendants having acquiesced to such payments being made in the interval, and without any previous demand of rent, distrained on the plaintiff as the executrix of her father, for six years and a quarter's rent due to them under the original letting to her father:—Held, that such distress could not be supported, and that the plaintiff might deny the title of the defendants, as it must be taken to have been determined by the notice to quit to them, and their acquiescence to an adverse or superior title by their omitting to demand any rent for so long a period after the service of such notice.

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v.
MEUX.

the said *Robert Neave* in his life-time, and until his death on the 30th August, 1819, held the said premises as tenant thereof to *Meux & Co.* at the said yearly rent of 70*l.* That after the death of the said *Robert Neave*, one *Elizabeth Neave* held the said premises as tenant thereof to *Meux & Co.*, at the said rent of 70*l.* until her death on the 21st February, 1821. That after her death, the plaintiff held the same premises, as tenant thereof to *Meux & Co.*, at the said rent of 70*l.* until the 25th March, 1821; and that because the sum of 437*l.* 10*s.* of the rent aforesaid, for six years and one quarter ending on that day, became due from the plaintiff to *Meux & Co.*, the defendant as their bailiff well acknowledged the taking, &c. Pleas in bar—*First*, that *Robert* and *Elizabeth Neave* in their respective life-times, or the plaintiff since, did not hold and enjoy the premises as tenants thereof to *Meux* and *Newberry*, or *Meux & Co.*; and *secondly*, that there was no part of the supposed rent in arrear from the plaintiff to them. On both these pleas issue was joined.

At the trial, before the late Lord Chief Baron *Richard*, at the last Spring assizes at *Kingston*, it appeared that by indentures of lease and release of October, 1771, made and executed on the marriage of one *John Mootham* the premises in question, consisting of the *Tumble Down Dick* public house, situate in the borough of *Southwark*, were conveyed to two trustees, to the use of *Mootham* and his assigns for life, and after his decease, to his wife and her assigns for life, and after their deaths, to the issue or children of the marriage, (if two or more), in such shares and proportions as *Mootham* and his wife during their joint lives should appoint, and in default of such appointment, to all the children of the marriage, in equal shares as tenants in common. This indenture also contained a power for *Mootham* during his life, and for his wife if she should survive him, to demise or lease the premises for any term of years not exceeding

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 or
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twenty-one years in possession, at the best rent that could be gotten for the same. *Mootham*, however, in *November, 1766*, granted a lease of the premises in question to one *John Darby*, from the 24th *June* in that year, for fifty-three years and a half, at the yearly rent of 40*l.* *Mootham* died on the 6th *July, 1804*, leaving his wife him surviving. At *Midsummer, 1809*, Messrs. *Clowes, Newberry*, and *Madden* became possessed of the premises in question, by virtue of an assignment of the lease granted by *Mootham* to *Darby*, and let them to the plaintiff's father at the yearly rent of 70*l.*, out of which they paid to *Mootham's* widow the rent of 40*l.*, as reserved in the original lease granted by *Mootham* to *Darby*. In 1813, *Clowes & Co.* dissolved partnership, and the residue of the term in *Darby's* lease having been assigned to *Newberry*, he joined Messrs. *Meux & Co.*, and his interest in the premises was accordingly vested in that firm; and on the 26th *November*, in that year, the plaintiff's father entered into a written agreement to hold under them at the above rent of 70*l.* a year, and he also stipulated thereby to purchase his beer of *Meux & Co.*, and not to part with the possession of the house or premises to any person without obtaining their previous consent. In *September, 1814*, *Mootham's* widow claiming a right to receive the rent of the premises, instead of *Meux & Co.*, and insisting that the lease granted by her husband to *Darby* was void, on the ground that it exceeded the power, which was limited to a term of twenty-one years only, and that she had done no act to confirm that lease, she gave the plaintiff's father notice to quit at the ensuing *Lady-day*, and caused a like notice to be served on *Meux & Co.*, who paid her the rent of 40*l.* a year up to that day. The plaintiff's father having also paid Messrs. *Meux & Co.* the half year's rent of 70*l.* then due to them, he agreed with *Mootham's* widow for a new lease of the premises for twenty-one years at 100*l.* a year, payable quarterly; and a lease was accordingly executed. And he paid the rent so reserved by that lease to her until her death in 1817, and to her re-

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representatives afterwards. In 1819, the plaintiff's father died intestate, when his widow took out letters of administration, and became possessed of his effects, and carried on business on the premises in question, and continued to pay the rent of 100*l.* until her death in *February*, 1821, to the representatives of Mrs. *Mootham*, when the plaintiff, as eldest daughter and executrix of her mother, *Elizabeth Neave*, took possession and carried on business in the house until the 12th of *April* in that year; when *Meux & Co.* without any previous demand or notice, distrained for six years and a quarter's arrears of rent, due at *Lady-day*, 1821, at 70*l. per annum*, after deducting 40*l.* a year as the rent reserved in the lease granted by *Mootham* to *Darby*, and which they were willing to allow. It was also proved that no rent was paid by *Meux & Co.* to *Mootham's* widow or her representatives, after *Lady-day*, 1815, nor had they ever made any demand for rent on the plaintiff's father, mother, or herself, until the distress in question was levied, although they continued to supply the house with beer.—Under these circumstances, the Lord Chief Baron stated, that whether there had been a legal determination of the original tenancy by the plaintiff's father to *Meux & Co.*, was purely a question of law; which being acquiesced in by counsel, he did not leave the facts to the jury, but directed a verdict to be taken for the plaintiff, subject to the opinion of the Court; and that if they should think there was no legal determination of the lease to *Meux & Co.* or that the plaintiff could be considered as holding under them instead of Mrs. *Mootham*, a verdict was to be entered for the defendant.

Mr. Serjeant *Lens*, in the last *Easter Term*, accordingly obtained a rule *nisi*, that this verdict might be set aside, and a verdict entered for the defendant instead thereof; and submitted that although the plaintiff's father had accepted a new lease from *Mootham's* widow, yet that it could not have the effect of destroying the original holding

under *Meux & Co.*, and consequently that the plaintiff must still be considered as their tenant, on the ground that a tenant in replevin cannot dispute his landlord's title; and as the plaintiff's father was originally let into possession of the premises under *Meux & Co.*, nothing less than a legal eviction could be pleaded in bar to the defendant's cognizance; and he relied on the case of *Balls v. Westwood*(a); where, in an action for use and occupation, the defendant having entered on the premises under the plaintiff, it was held that he could not shew that the title of the latter had expired, unless he had solemnly renounced it at the time, and commenced a fresh holding under another person: —

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MOSE.

Mr. Serjeant *Taddy* now shewed cause, and contended that as *Mootham* had only a life interest in the premises; with a power under the settlement to grant a lease for twenty-one years; instead of which, he had demised them for fifty-three years and a half, that lease was absolutely void as against the person next in remainder. His widow therefore was entitled to grant a new lease at any time after his death, as she had not acquiesced in or been a party to the former. By her causing a notice to quit to be served on *Meux & Co.* as well as their sub-tenant *Neave*, (the plaintiff's father), it determined the estate of both; and a new lease was accordingly granted by Mrs. *Mootham* to *Neave* at an advanced rent, and which had accordingly been since paid to her as the superior landlord. *Neave* must therefore be taken to have attorned to her, and as no demand for rent was made by *Meux & Co.* for six years and a quarter previously to the distress in question, they must be considered as having acquiesced in such attornment, or at all events as being cognizant of it, as they never paid any rent to Mrs. *Mootham* after such new lease

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was granted. This case is therefore altogether distinguishable from *Balls v. Westwood*, as there the same tenancy continued and existed at the time of the commencement of the action, whilst here, the original tenancy was determined; the lease granted by *Mootham* to *Darby* being altogether void, and not merely voidable. There, too, it does not appear that the landlord was ever informed of any claim conflicting with his own title, or that he was aware of the seizure, or forfeiture of the copyhold tenement to the lord of the manor, whilst here, *Moss & Co.* had full notice of the adverse claim of *Mrs. Mootham*, as a superior landlord, by being served with a notice to quit, and by which their title was legally determined. Although it is true that a tenant cannot dispute his landlord's title in an action of replevin, yet he may show that his interest is determined; and if a landlord lies by, and suffers acts to be done, such as allowing a new lease to be executed at an increased rent, and thereby acknowledging the title of a new landlord, and not instructing his tenant to resist, it is competent for the latter to say that his former tenancy is determined; and more particularly so, as in this case *Moss & Co.* paid no rent to *Mrs. Mootham* after such new lease was executed; and if they may distrain under such circumstances, at the distance of six years, they may do so at any period within the term of the fifty-three years granted by the original lease, and which will not expire until the year 1838.

Mr. Serjeant *Bosanquet* in support of the rule, relied on the general principle, that a tenant in replevin cannot dispute the continuance of his landlord's title, under whom he originally held, and although rent may be in arrear for a number of years, it will not prejudice the claim of the latter. The plaintiff, as the representative of the original tenant, should have given notice to *Moss & Co.* that she held adversely to them, or at all events should have given

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them notice of disclaimer, on which they might have brought an action of ejectment without notice, in order to ascertain whether their title had been determined or not. — The case of *Balls v. Westwood* determined, that in an action for use and occupation, the tenant could not shew that his landlord's title had expired unless he actually renounced it at the time; and that doctrine is applicable to an action of replevin. But it is otherwise, in the case of an ejectment, as there, the tenant is considered as a trespasser and not a continuing tenant; but if a person agrees to take a house or land, and occupies it accordingly, it is not incumbent on the party letting it to shew any title, and the occupier must continue as his tenant, and pay rent to him alone, as the same tenancy continues which was created by the original demise. Lord *Ellenborough*, in *Balls v. Westwood*, asked whether the defendant by any formal act renounced the plaintiff's title, or divested himself of the possession he obtained under him? That question is applicable to the present case, for the plaintiff never did any act to renounce or disclaim the title of *Meux & Co.*; and any agreement between her father and Mrs. *Mootham* cannot affect the plaintiff; and it must be now taken that she held under *Meux & Co.* at the time the distress in question was made.

Mr. Justice PARK. — I am of opinion that this verdict ought not to be disturbed. By so deciding, we shall not weaken the case of *Balls v. Westwood*, for I perfectly concur with the grounds of that decision: nor shall we impeach the doctrine there laid down by Lord *Ellenborough*, as it is sufficient to say that the present differs very materially from it both in facts and circumstances. It is quite clear that a tenant cannot be permitted to impeach the validity of his landlord's title; still, however, it is competent for him to shew that such title has expired; and generally speaking, a tenant who holds or occupies under his

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original landlord cannot afterwards change his holding, but must continue to pay rent to the party whose title he first recognized. What then are the circumstances of this case? *Mootham* originally granted a void lease to *Darby*, which, after several mesne assignments, was vested in *Meux & Co.* who underlet the premises thereby demised to the father of the present plaintiff. *Mrs. Mootham*, after the death of her husband being legally entitled to the property, caused a notice to quit to be served on *Meux & Co.* and the plaintiff's father, the then tenant in possession. *Meux & Co.* did not dispute, but rather admitted her title, as they raised no objection when they were served with the notice to quit. The plaintiff's father afterwards paid an increased rent to *Mrs. Mootham*, to which *Meux & Co.* acquiesced; as they afterwards paid no rent to her, nor did they make any claim on the sub-tenants or occupiers for six years and a quarter, although they continued to supply the house with beer, and were regularly paid for it by the plaintiff's father, mother, and herself, and during all which time the rent was paid by them to *Mrs. Mootham*. This therefore appears to me to have been an acquiescence on the part of *Meux & Co.* as to the determination of their title, and equivalent to a disclaimer by the tenant *Neave*; yet it has been said, that the plaintiff, as representative of the original tenant, should have given them a notice of disclaimer; but in *Balls v. Westwood*, Lord *Ellenborough* asked "whether the defendant divested himself of the possession he obtained under the plaintiff, and commenced a fresh holding under another person?" Here, it might be answered, that the tenant not only held under another, but paid rent to such other person for six years and a quarter, during which *Meux & Co.* made no claim, nor did they ever venture to interfere; but they themselves discontinued to pay rent to *Mrs. Mootham* after *Lady-day*, 1815, when their term must be taken to have expired according to the notice to quit. Under these circumstances, therefore, it appears to me

that they admitted that they had no title to receive the rent in question, or at all events, by their having lain by so long, that it amounted to an acquiescence by them for *Mrs. Mootham* to receive the rent; and more particularly so, as they continued to supply the house with beer, without attempting to enforce or even demanding any rent as due to them on the lease, under which the defendant now makes cognizance. It is only necessary further to observe, that the counsel at the trial acquiesced with the Lord Chief Baron, that the question in this case was a mere question of law, and not for a jury.

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Mr. Justice BURROUGH.—I also think that the verdict as it now stands is perfectly right. It is a well known principle that a tenant cannot renounce his landlord's title; but when the former is called on to pay rent by two different claimants, he must resort to a Court of Equity, by filing a plea of interpleader. Here, however, it appears to me, that *Meux & Co.* by their own conduct relinquished all idea of asserting their title to receive rent from *Neave*, as their sub-tenant: for, in the first place, their original title was at an end, as the lease assigned to them was void at law; and in the second, a notice to quit was not only served on them, but on *Neave* their tenant also. This notice was given for the express purpose of shewing that *Mrs. Mootham* considered that their title was at an end. Besides, it appears that there were dealings for several years afterwards, between *Meux & Co.* and the tenants of the premises, and that the former were constantly in the habit of supplying the latter with beer, which was regularly paid for, and yet no demand whatever was made by them for rent for more than six years. On the whole, therefore, it appears to me that their silence must be taken as an acquiescence by them as to the determination of their title, and that it was properly so considered by the late Lord Chief Baron at the trial. Although such ac-

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quiescence might be a matter of fact to go to a jury, yet as the counsel in the cause treated it as a mere question of law, there appears to me to be no ground whatever to disturb the verdict found for the plaintiff. This rule, therefore, must be

Discharged (a).

(a) See *Ward v. Mason*, 9 Price, 291.

Friday,
Nov. 21st.

TAYLOR v. EVANS.

Where a sheriff's officer, having received a writ to arrest the defendant, permitted him to go at large on his promising to put in good bail, and afterwards finding that the bail intended to be put in were insolvent, he put in bail for his own indemnity and without the consent of the defendant, and took him in custody in their discharge the day previous to that on which the defendant's time for putting in bail would expire: the Court ordered the defendant to be discharged,

MR. Serjeant *Pell*, on a former day in this Term, obtained a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of custody as to this suit; and that three persons, by the names of *Sweet*, *Young*, and *Wilson*, might pay the costs of this application, which was founded on an affidavit, stating that *Sweet* was an officer to the sheriff of *Middlesex*, and that *Young* and *Wilson* took the defendant to a lock-up house kept by the former, on *Sunday*, the 9th instant, stating that *Young* was one of the defendant's bail, and that he had come to render him in his discharge. That *Wilson* was also a sheriff's officer, and acquainted with *Sweet*, and that *Young* was the follower of *Wilson*. That the defendant was accordingly confined in the house of *Sweet*; and that if *Young* had become bail for him, it was done without his knowledge or consent.

MR. Serjeant *Vaughan* now shewed cause on affidavits, which stated that *Wilson* having, in *September* last, received a writ to arrest the defendant as the acceptor of a

and the officer to pay the costs of the application; and it appearing that two others were implicated in the transaction, they were required to join in the payment of such costs.

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bill of exchange for 25*l*. he served him on the 6th October, but allowed him to remain at large on his promising to procure good bail: That he gave in the names of two persons as bail, who were both in the *King's Bench* Prison. That a bail-bond was afterwards prepared and executed by one bail only; and that on the 6th instant, *Wilson* having been informed that the sheriff had been ruled to return the writ, he, on the following day, caused *Young* to be entered as the other bail, for the purpose of indemnifying himself, but without obtaining the defendant's previous consent, and that he was accordingly rendered on the 9th, as above stated.—Under these circumstances, the learned Serjeant contended, that *Wilson* was fully justified in acting as he did, through the misconduct or want of good faith on the part of the defendant, as he had acted surreptitiously in not having procured two proper or responsible persons as bail, according to his original undertaking. The officer was consequently imposed on, and warranted in putting in *Young* as bail, without the knowledge or consent of the defendant. At all events, *Sweet* cannot be considered as being responsible, as he could not know under what authority *Wilson* acted, when he brought the defendant to his house.

Mr. Serjeant *Pell*, in support of the rule, submitted that *Young* could not, under any circumstances, be put in as bail for the defendant, as he stood in the situation of a sheriff's officer; and he produced an affidavit, stating that the time for the defendant to put in bail did not expire until the 10th instant, although *Wilson* had thought proper to do so on the 7th, and taken the defendant into custody on the 9th.

Mr. Justice PARK.—The defendant was brought before me at chambers on the 11th instant, by virtue of a prerogative writ of *habeas corpus*, which should never be

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taken out without a special application; for if this precaution were not taken, it might be productive of the most serious consequences, and made a medium of throwing open all the prison-doors in the kingdom. However, it appears to have been done inadvertently. But the Court must see that justice is purely administered, and that their officers conduct themselves with fidelity and propriety. The whole of the proceedings in this case appear not only to have been outrageous, but altogether unjustifiable. *Wilson* neglected his duty in the first instance, and as *Young* was his follower, he could never be answerable or amenable as bail; and as *Sweet* also appears to be implicated in the transaction, it is but just that these parties should pay the costs of this application.

Mr. Justice BURROUGH concurring, the rule was accordingly made

Absolute (a).

(a) See *Rex v. Butcher*, Peake's N. P. C. 168, 3d edit. 226.

Saturday,
Nov. 22nd.

COPLAND v. POWELL, Esq.

Where a sheriff levies for arrears of taxes under the statute 48 Geo. 3, c. 141, No. 5, Rule 2, he is not entitled to a month's notice, previously to an action being commenced against him for an irregularity in the levy, there being no clause in that act requiring such notice.

THIS was an action on the case, and brought against the defendant as late sheriff of the county of *Kent*, for an excessive levy under a writ of *levari facias*, issued out of the Court of *Exchequer*, under the statute 48 Geo. 3, c. 141, against the goods of the plaintiff, in respect of arrears of assessed taxes due from him to the Crown. The first count of the declaration, after stating the issuing of the writ, and delivery thereof to the defendant as sheriff, averred that he seized and sold fixtures, when there were more than sufficient moveable goods and chattels on the

premises to satisfy the debt due to the Crown, and expenses of levying. The second count stated that he seized more goods than were sufficient to pay the arrears due and costs of the levy, and sold them at a much less sum than they were worth; and the third count was in trover.—Plea, Not guilty. At the trial before the late Lord Chief Baron *Richards*, at the last Spring assizes at *Maidstone*, after the plaintiff's counsel had opened his case, and proceeded to examine a witness, it was contended for the defendant that he must be nonsuited, inasmuch as he had not given the defendant a month's notice of action, to which he was entitled, previously to its commencement, under the statute 43 *Geo. 3*, c. 99, s. 70 (a). His Lordship took a note of the objection, but allowed the cause to proceed, in order that the jury might assess the damages, in case the plaintiff should be entitled to recover on the merits; and it appear-

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(a) By which it is enacted, that "if any action or suit shall be brought against any person or persons for any thing done in pursuance of that act, or any act for granting duties to be assessed under the regulations of that act; such action or suit shall be commenced within six calendar months next after the fact committed, and not afterwards, and shall be laid in the county or place where the cause of complaint arose, and not elsewhere; and that no writ or process shall be sued out for the commencement of such action or suit, until one calendar month next after notice in writing shall have been delivered to, or left at the usual place of abode of such person or persons, by the attorney or agent for the intended plaintiff or plaintiffs; in which notice shall be clearly and completely contained, the cause and causes of action, the name and place or places of abode of the intended plaintiff or plaintiffs, and of his or their attorney or agent; and no evidence shall be given on the trial of such action or suit of any cause or causes of action than such as is or are contained in such notice; and the intended defendant or defendants, to whom such notice shall have been delivered, may at any time before the expiration of such calendar month tender amends to the intended plaintiff or plaintiffs, his or their attorney or agent; and in case such amends are not accepted, may plead such tender in bar to any action or suit, to be brought against him or them, grounded on such notice, writ, or process."

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ing that the defendant's officer had sold more than sufficient to satisfy the sum required to be levied under the writ, they found a verdict for the plaintiff on the second count of the declaration, damages 40s., which they considered the amount of the surplus in the hands of the defendant or his officer; and they found for the defendant on the other counts. Leave, however, was reserved to him to move the Court to set aside the verdict for the plaintiff, and enter a nonsuit, in case they should be of opinion that the objection as to the want of notice was well founded.

Mr. Serjeant *Taddy*, in the last *Easter* Term, accordingly obtained a rule *nisi*, and submitted in the *first* place, that as the *levari facias* was issued by virtue of the assessed tax acts, and the present cause of action arose from an act done in pursuance thereof, the defendant, as sheriff, was entitled to a calendar month's notice of action, previously to its commencement, under the statute 43 *Geo.* 3; and that although the levy was made under the 48 *Geo.* 3, c. 141 (a), still, that all the statutes relating to the collecting and levying assessed taxes, must be taken *in pari materid*; and that the defendant ought to have been allowed the opportunity of tendering the plaintiff amends before the action was brought. *Secondly*, sup-

(a) An act to amend the acts relating to the duties of assessed taxes, and to regulate the assessment and collection of the same, whereby, after reciting that it was expedient that certain of the powers and provisions for assessing and collecting the duties under the management of the commissioners for the affairs and taxes of *Great Britain*, should be varied and amended in the particulars thereafter mentioned; it was enacted, that all assessments of the said duties, or any of them, should be returned, estimated, ascertained, and made, and that the said duties should be collected, levied, paid over, and accounted for under and subject to certain rules and directions which should be deemed as part of that act, as if the said rules and directions had severally and respectively been inserted therein under a special enactment.

posing the defendant not to be entitled to such notice, the plaintiff cannot recover, as no demand was made on the defendant for the surplus arising from the levy before the commencement of the suit; and in *Jefferies v. Sheppard* (a), where, in an action brought against the sheriff for money levied under a *fiery facias*, without any previous demand, the Court stayed the proceedings on payment of the sum levied, without costs. So, here, the defendant was ready to pay over the surplus to the plaintiff whenever it might have been demanded; but the plaintiff, instead of doing so, laid by, and went down to trial.

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The Court observed, that this being a debt due from the plaintiff to the Crown, was not like the case of an individual; or that, at all events, the sheriff should have applied to the Court to stay the proceedings, as in *Jefferies v. Sheppard*, and not allowed the plaintiff to have gone down to trial:—the rule was accordingly granted on the first point only, *viz.* as to whether the defendant was entitled to notice of action.

Mr. Serjeant *Bosanquet* shewed cause on a former day in this Term, and submitted, that the levy having been made by the defendant as sheriff, under the statute 48 Geo. 3, c. 141, No. 5, Rule 2*, by which a particular

(a) 3 Barn. & Ald. 696.

* No. 5. Rules and directions for paying to the Receiver-General, and accounting for the duties received by the collectors.

First, The collectors were to pay the duties levied to the Receiver-General, and account with him twice in each year, on which he was to give them a receipt; but if the collectors should not account, they should deliver to the Receiver-General a written schedule signed by them, containing the name of each defaulter, and the sums in arrear from each.

Second. Every such schedule, being certified under the hand of the Receiver-General, or his deputy, of the county or division where the

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mode of levying for arrears of assessed taxes is clearly pointed out, and which is altogether different from that prescribed by the 43 Geo. 3, c. 29; as by the 48 Geo. 3, the certificate of the schedule of arrears by the Receiver-General, is to be taken as sufficient evidence of a debt due to the Crown, and a sufficient authority to the Barons of the *Exchequer* to cause process to issue to levy the sum in arrear; and the sheriff is directed to levy the same without delay, as for a debt due to his Majesty. Whereas, by the 33d section * of the 43 Geo. 3, the collectors were au-

arrears accrued, to the Court of Exchequer at *Westminster*, shall be received and taken as sufficient evidence of a debt due to his Majesty, and shall be a sufficient authority to the Barons of the said Court, or any one of them, to cause process to be issued against such defaulter named in the said schedule, to levy the whole sum in arrear and unpaid by such defaulter; and the sheriff or other officer to whom the said process shall be directed, shall without delay cause the whole sum in arrear to be levied by due course of law, as a debt due to his Majesty on record, with all costs and expences attending the same; and shall pay the monies so levied, after deducting the said costs and expences to the said Receiver-General or his deputy, and shall make return of the said process to the said Court, according to the due course thereof."

* By which it is enacted, "that if any person or persons shall refuse to pay the several sum and sums charged upon him or them, by any act or acts granting the duties therein mentioned, or any other duties to be assessed under the regulations of that act, upon demand made by the collector or collectors of the division or place, according to the precepts or estreats to him or them delivered by the commissioners, it shall be lawful to and for such collector and collectors, or any of them, who were thereby respectively thereunto authorized and required, for non-payment thereof to distrain upon the messuages, lands, tenements, and premises, charged with any sum or sums of money, or to distrain the person or persons so charged, by his or their goods and chattels, without any further authority from the commissioners for that purpose, than the warrant to such collector or collectors delivered at the time of his or their appointment; and the distress so taken to keep by the space of four days, at the costs and charges of the party so refusing; and if the said party did not pay the respective sums of money so due

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thorized to distrain for the arrears of duties imposed by that act, without any further authority from the commissioners, than the warrant delivered to such collectors, at the time of their appointment. The notice required by the 70th section of that act must be confined to the persons specified and acting in pursuance of it, and cannot be extended to the 48 Geo. 3, as that statute contains no clause by which a plaintiff is bound to give the sheriff a month's notice of action, and from which it must be presumed that such notice was not required to be given, as, if it had been, the Legislature would have introduced a specific clause to that effect, as in the previous statute of the 43 Geo. 3, c. 99.

Mr. Serjeant *Taddy*, in support of the rule, contended, that as under the provisions of the statute 48 Geo. 3, c. 141, the sheriff was expressly directed by the Legislature to levy the arrears of taxes, instead of the collectors appointed under the 43 Geo. 3, c. 99, it might fairly be inferred that the protection given to the one, should be extended to the other, and more particularly so as the clear intent of the Legislature was to protect all persons generally, by whom the collection of the taxes for the revenue should be effected. This will depend on the whole of the statutes passed for that purpose, which must be construed in *pari materia* and taken together. Nothing is repealed by the latter statutes, except what is therein expressed to be the subject of repeal; and wherever any

within the said four days, then the said distress was to be appraised by two or more of the inhabitants where the said distress was taken, or other sufficient persons, and there to be sold by the said officer for payment of the said money, and the overplus coming by the said distress (if any there be) after deducting the said money, also the costs and charges of taking, keeping, and selling the said distress, which costs and charges the said officer was thereby authorized to retain, to be restored to the owner thereof."

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alteration has been found necessary, it has been merely introduced by way of re-enactment of the former acts, and the regulations as to the levying and collecting have never been repealed. It is quite clear, that all persons acting in pursuance of the 43 *Geo.* 3, c. 99, are entitled to a month's notice, under the 70th section of that act. By the 43 *Geo.* 3, c. 161, s. 5 *, it is provided that the duties shall be levied and collected under the same regulations as provided by the 43 *Geo.* 3, c. 99; and by s. 86, a calendar month's notice is required to be given previously to the commencement of an action, for any thing done in pursuance of that act, in precisely the same terms as in the statute 43 *Geo.* 3, c. 99, s. 70. Although the duties contained in the schedules annexed to the 43 *Geo.* 3, c. 161, are repealed by the subsequent act of 43 *Geo.* 3, c. 55, s. 2 †, yet all the provisions contained in the former statute, as far as the same relate to the ascertaining, assessing,

* By which it is enacted, "that all the several duties thereby granted, shall be assessed, raised, levied, and collected under the regulations of the 43 *Geo.* 3, c. 99, and that all and every the powers, authorities, methods, rules, directions, penalties, forfeitures, clauses, matters and things contained in the said act, shall be severally and respectively duly observed, practised and put in execution; as fully and effectually, to all intents and purposes as if the same powers, &c. &c. were particularly repeated and re-enacted in the body of that act; and that all and every the regulations of the 43 *Geo.* 3, c. 99, should be respectively applied, construed, deemed and taken to refer to the 43 *Geo.* 3, c. 161, as if the same had been specially enacted therein."

† By which it is enacted, "that the duties contained in the several schedules annexed to the 43 *Geo.* 3, c. 161, and two subsequent acts of the 45 *Geo.* 3, c. 13, and 46 *Geo.* 3, c. 78, shall at and upon the respective periods appointed for the commencement of the duties granted by that act, severally cease and determine: save always and except the several powers, provisions, clauses, penalties, matters and things contained in the said act of 43 *Geo.* 3, c. 161, for ascertaining, assessing, collecting, levying, paying and accounting for the said duties; which powers, &c. &c. shall be and were thereby respectively continued in full force and effect, for the ascertaining, assessing, collecting, levying, paying, and accounting for the duties granted by that act.

collecting, and levying the duties, are thereby saved and excepted. So the 48 Geo. 3, c. 141, after directing how the duties shall be collected, levied, and paid over;—provides by No. 3, Div. 3*, that nothing therein contained shall impeach or affect the powers or provisions of the said acts for the recovery of the said duties, and that it should be lawful to levy the same according to the said acts. That must be taken to apply to all the acts in force, relating to the collecting and levying for taxes when the latter statute was passed, and which still remain unaltered, unless there be any re-enactment to the contrary. The same clauses, therefore, which protected collectors, or any other persons levying under the statutes 43 Geo. 3, c. 99, and 43 Geo. 3, c. 161, are equally applicable to the case of a sheriff on whom a similar duty is imposed; and indeed the latter is even entitled to a larger degree of protection, as the 48 Geo. 3, c. 141, merely alters and regulates the mode as to collecting the arrears, and does not affect the times or proportions at which the duties are to be payable, or impeach any of the former statutes which were passed for their recovery. All the clauses therein contained as far as regards the levying are preserved, and

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* No. 3. Rules and directions for making and returning the certificates of assessment, or certificates of estimates, by assessors acting under the said acts, and for making and collecting the first assessments in each year.

Third. The first assessments of the duties were to be made according to certain estimates, without including any matters of surcharge, and to be collected and levied in *October* and *April* in each year: "provided always that nothing therein contained should be construed to alter the times or proportions at which the said duties were payable according to the directions of the said acts respectively, or in any way to impeach or affect the powers or provisions of the said acts, for the recovery of the said duties at such times, and in such proportions as were therein prescribed, and that it should be lawful to demand, receive, or levy the same according to the said acts, any thing therein contained to the contrary notwithstanding.

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the sheriff is merely substituted for the collector, who now makes his return of arrears due to the Receiver-General, which he certifies to the Court of *Exchequer*, on which the Barons of that Court direct the sheriff to levy, instead of the collector's distraining in the first instance. The sheriff, as the superior officer, is at all events entitled to the same privileges as the inferior; and the Legislature are ever anxious to protect all those persons on whom an invidious duty is cast by their means, for the purpose of compelling the payment of those duties which are to be applied for the services of the revenue.

The Court, observing that there was no decision where a construction appeared to have been put on either of the clauses of the statutes referred to, or any others which bore an analogy to them, took time to consider. And on this day,

Mr. Justice PARK delivered the following judgment:

This case came before the Court on a motion for leave to enter a nonsuit, on the ground that no notice of action had been given to the defendant as sheriff, under the statute 43 Geo. 3, c. 99, s. 70, which requires one calendar month's notice to be given to any person or persons, of any action or suit, to be brought against him or them for any thing done in pursuance of that act.

The action was brought for an excessive levy, under a writ of *levari facias* issuing out of the Court of *Exchequer*; and upon the above objection being taken by the defendant's counsel at the trial, the late Lord Chief Baron reported to us, that he thought there was no weight in it, and the present motion is founded on this supposed mistake of his Lordship in point of law. But the Court are of opinion that his Lordship was perfectly right.

The statute 43 Geo. 3, c. 99, has made several provisions for various acts to be performed by a great number of per-

sons in the execution of it, with respect to levying and collecting certain taxes thereby imposed, and many of them being persons who might in all probability be not well acquainted with the technicalities required by law, a protection was thrown around them by the 70th section of the statute, which has given rise to, and been the subject of the argument at the bar.

By that statute, however, no duty is imposed on the sheriffs of counties, their names are not even mentioned, and they had then nothing to do with the collection of taxes, and therefore, when the words "*person or persons*" are referred to in that section, they cannot be taken to mean persons in general, but such persons only as are the subject of the preceding legislative enactments or regulations, as contained in that statute. It has been admitted that the provisions of that act are in a great measure repealed by the statute 48 Geo. 3, c. 55, s. 2, but it has still been insisted, that the provisions respecting the notice under the 70th section of the former act are still in force, and must be continued; for that although the 48 Geo. 3, repeals all the duties of the 43d, 45th, and 46th Geo. 3, yet that it "saves always and excepts the several powers, provisions, clauses, penalties, matters, and things contained in the last mentioned act of the 43 Geo. 3, c. 161, for ascertaining, assessing, collecting, levying, paying, and accounting for the said duties, which powers, &c. shall be and continue in full force and effect, for the ascertaining, assessing, collecting, levying, paying, and accounting for the duties granted by that act. Save also and except in all cases relating to the ascertaining and assessing any of the said duties thereby repealed, which, at any time after the respective periods before mentioned, for the commencement of the duties granted by that act, shall not have been charged within the year, for which the said duties ought to have been charged; and also save and except as to the recovering, collecting, paying, or accounting for any arrears of the several duties thereby repealed, which might

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remain unpaid at the said periods respectively as aforesaid; and any penalties or forfeitures then incurred."

If it were necessary to decide, (but which in our view of the case it is not), whether the 70th section of the statute 43 Geo. 3, c. 99, was still reserved by either of those exceptions, we should be inclined to think it was not, for they appear only to reserve, *first*, the means of ascertaining the new duties in the same manner as before; *secondly*, the means of ascertaining such duties as had not been ascertained within any preceding year before the repeal of the 43 Geo. 3; and *lastly*, the mode of recovering such arrears as had accrued under the old act, and any penalties or forfeitures incurred prior to the repeal.

It is to be observed, that the sheriff is not mentioned in the statute 43 Geo. 3, c. 55, but it has been said, that as that statute reserves the 70th section of the 43 Geo. 3, c. 99, (a similar clause having been introduced therein), it is now to be applied to any subsequent statute, giving authority to any other person or persons to act, and consequently that such must now be the case in regard to sheriffs, under the statute 48 Geo. 3, c. 141, No. 5, Rule 2, *viz.* "rules and directions for paying to the Receiver-General, and accounting for the duties received by the collectors."

Admitting, for the sake of the argument, that the 70th section of the 43 Geo. 3, c. 99, still remains in force, it cannot be supposed for a moment, that when the last statute directs the Receiver-General to return his schedule of defaulters to the Barons of the *Exchequer*, who are to issue their process to the sheriff or other officer, to be levied *by due course of law* as a debt due to his Majesty on record, with all costs and expences attending the same; that such sheriff or officer is entitled to notice, not having it expressly secured to them.

Here, the sheriff is called on to do nothing more than is within the usual course or ordinary duties of his office, *viz.* to obey the process, and conform to the directions of a

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supreme Court. He exercises no judgment or discretion on the subject, and no peculiar burthens are imposed upon him, and it might be equally contended, that he is entitled to a notice of action for an excessive levy under a writ of *feri facias*, as upon this process. By the common law, the merely bringing an action is of itself a sufficient demand and notice, and every instance to the contrary must be in consequence of a legislative enactment. We, however, are inclined to think that the 70th section of the 48 Geo. 3, c. 99, is repealed by the 48 Geo. 3, c. 55; but if not, we are of opinion that it can only apply to such persons as were therein before named, and cannot be extended to such superior officers as sheriffs, according to the well known and established rule, that statutes which treat of things or persons of an inferior rank, cannot by any general words be extended to those of a superior degree; under which rule as laid down in the Archbishop of *Canterbury's* case (*a*), a statute treating of deans, prebendaries, parsons, vicars, and *others* having spiritual promotion, was held not to extend to bishops, although they had spiritual promotion; for if it had been otherwise intended, the superior persons would have been named in the beginning of the sentence and not in the end; and deans being the highest persons named, and bishops being of a still higher order, an intention to include them cannot be implied (*b*). The rule therefore for entering a nonsuit in this case must be

Discharged.

(*a*) 2 Rep. 46. *b*. ——— (*b*) See Black. Com. Vol. I. Page 88.

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BUTLER and Another v. STOVELD.

Where a Judge at chambers, refused to allow interest on a judgment for damages in an action of *assumpsit* on a special agreement for the purchase of timber at a certain rate per load; on the ground that the original debt would not carry interest, and a Judge's order was accordingly made for staying the proceedings in the action on the judgment on payment of the sum recovered with costs, the Court refused to discharge such order, the plaintiff having afterwards complied with the terms of it by accepting such sum and costs.

THIS was an action on a judgment for damages sustained by the plaintiffs, in 1821, in an action of *assumpsit* on a special agreement, in which the defendant had become surety for the payment of 1200*l.* on the purchase of timber, at a certain rate, *viz.* 901 oak trees, at 10*l.* 5*s.* per load, and which had been accordingly delivered by the plaintiffs to his principal, who had become insolvent. The plaintiffs having brought their action as trustees, were prevented from suing out execution through the defendant's having taken out an injunction to stay the proceedings in the Court of Chancery, which had been but lately dissolved, on which the defendant's attorney applied to Mr. Justice *Burrough* at chambers, to stay all further proceedings in this action, on payment of the sum recovered in the original action, together with the costs; when it was submitted for the plaintiffs, that they were entitled to interest on the judgment; but the learned Judge being of opinion that the original cause of action being for goods sold, it did not carry interest, and accordingly made an order as prayed for by the defendant, *viz.* to stay the proceedings in this action, on payment of the sum recovered, and costs, and which the plaintiffs then acceded to, and afterwards accepted.

Mr Serjeant *Cross*, now applied for a rule *nisi*, that this order might be discharged; and that the plaintiffs might notwithstanding be allowed to proceed in the action, on the ground that interest was due on a judgment for damages, when such damages were intended to cover a specific sum fixed on and ascertained by a previous agreement. Although the Court of *Exchequer Chamber* will not give interest in an action for mere unliquidated dam-

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ages, yet in *Sykes v. Harrison* (a), they allowed it to a defendant in error on a judgment of *nonpros*. There, the plaintiff in error obtained an injunction in the Court of *Exchequer*, which was not dissolved until a year and a half had expired from the time final judgment was signed; and Lord Chief Justice *Eyre* said, "that as the plaintiff in error had proceeded in equity without just ground, as the event had shewn, by his bill having been dismissed, it was a strong reason to induce the Court to go as far as they could against him, and the interest was accordingly allowed. And in *Powell v. Saunders* (b), although that Court refused to allow interest on affirmance of a judgment, which was entered generally on a declaration in *assumpsit*, where some of the counts were for unliquidated damages, yet they said that they would do so, where it was distinctly shewn that the judgment was for a debt. — At all events, in this case the defendant might have obtained delay by a mere stratagem, or the injunction might have been fraudulent; and as the plaintiffs have been restrained from suing out execution for more than two years, they are entitled to the interest as prayed for.

Mr. Justice PARK. — In *Doran v. O'Reilly* (c), it was laid down as a rule, that where interest is given, the debt must appear on the face of the record to be one which carries interest. Here the original cause of action, and on which the judgment was obtained, was for goods sold and delivered, and no authority has been cited to shew that interest is allowable on such a demand. At all events, the plaintiffs should either have objected to the order of my Brother *Burrough*, or refused to accept the terms offered them at chambers, but to which it appears they afterwards acceded.

(a) 1 Bos. & Pul. 29. — (b) 5 Taunt. 28. — (c) 3 Price, 250.
N. C. 7 Taunt. 244.

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Mr. Justice BURROUGH. — When this case came before me at chambers, I at first doubted whether the plaintiffs were entitled to interest on the judgment as claimed by them; but after consideration I thought they were not, on the ground that the plaintiffs' original debt being for goods sold and delivered, it would not of itself carry interest, and consequently that they could not be entitled to it on a judgment for damages on such a demand. — But the plaintiffs agreed to accept the amount of the sum recovered and costs, and the order was drawn up accordingly; and it would be too much to allow them to succeed in the present application to the Court, and more particularly so, as it appears that they have since complied with the terms of the order by accepting such debt and costs.

Rule refused.

Tuesday,
Nov. 25th.

JOHN STEWART and THOMAS STEWART v. LAWTON.

In an action of covenant for the breach of an indenture of apprenticeship, and brought by the father and apprentice against the master, they cannot be called on at the trial to make oath as to the amount of the premium actually paid

with the apprentice at the time he was bound, as required by the statute 8 Anne, c. 9, s. 45, as it must be presumed that such oath was taken before the commissioners of stamps, at the time the stamp was impressed on the indenture.

THIS was an action for a breach of covenant in an indenture of apprenticeship, and brought by the apprentice and his father against the master. The declaration stated, that on the 29th June, 1819, by a certain indenture made between the plaintiffs of the one part, and the defendant of the other, it was witnessed that the son bound himself apprentice with the defendant to dwell, remain, and serve from the day of the date of the indenture, until the 23d November, 1824, when he would attain the age of twenty-one; that the defendant covenanted that he would teach

and instruct the apprentice in the business of a druggist and chemist, and provide him with meat, drink, and lodging fit for a person in his station during the apprenticeship. That, in pursuance of the indenture, the son entered into the service of the defendant as such apprentice, and continued in such service until the 25th December, 1821; that the son had always from the time of making the indenture until that day, performed all things therein contained on his part to be performed and fulfilled, and that although he had always been ready and willing from that day hitherto, to continue with and serve the defendant as such apprentice; yet that the defendant did not nor would teach him the business of a druggist and chemist, or find and provide for him sufficient, or any meat, drink, and lodgings; but that the defendant from the said 25th December, 1821, hitherto, wholly neglected and refused so to do: by means whereof, the son had lost and been deprived of all the profits which he might have derived from the performance of the covenant by the defendant.—The defendant having craved oyer of the indenture, pleaded *first, non est factum*: *secondly*, that the son misbehaved himself and refused to obey the lawful commands and orders of the defendant, and conducted himself so improperly that he could not keep him, wherefore the defendant on the 25th December, 1821, dismissed him: and *lastly*, that the son frequently absented himself from the defendant's service without his consent and against his will, contrary to the effect of the indenture. On these pleas issue was joined.

At the trial, before Mr. Justice Bayley, at the last Summer Assizes at York, after the plaintiffs' witnesses had proved the execution of the indenture, it appeared that the principal ground of defence was the mis-statement of the amount of the premium in the indenture, viz. 48*l.* for 50*l.* The defendant called two witnesses, who swore that both the plaintiffs had admitted to them that the premium actually paid was 50*l.*; but the plaintiffs called three witnesses

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who said that they saw no more than 48*l.* paid, when it was objected for the defendant that the indenture could not be given in evidence, until the plaintiffs had first made oath that the sum inserted therein, as the premium paid with the apprentice, was really and truly all that was directly or indirectly given, paid, secured, or contracted for in behalf or in respect of such apprentice, as required by the statute 8 *Anne*, c. 9, s. 43(a). The learned Judge enquired of the plaintiffs' counsel, whether they would call their clients to take the oath, which they declined doing, although they were both in Court, insisting that the statute was no longer in force, but had been virtually repealed. The learned Judge, however, allowed the cause to go to the jury on the merits; and the indenture, which was duly stamped, was accordingly read; and they found a verdict for the plaintiffs, damages 40*s.* Leave, however, was given the defendant to move to set it aside, and that a nonsuit might be entered, if the Court should be of opinion that the objection was well founded.

Mr. Serjeant *Taddy*, on a former day in this Term; accordingly obtained a rule *nisi*, that this verdict might be set aside, and instead thereof a nonsuit entered, or a new

(a) By which it is enacted, "that no indenture or writing required by that act to be stamped, shall be given or admitted in evidence in any suit to be brought by any of the parties thereunto, unless such party on whose behalf the same shall be given or admitted in evidence, do first make oath, that to the best of his or her knowledge, the sum or sums therein for that purpose inserted or mentioned was or were really and truly all that was directly or indirectly given, paid, secured, or contracted for on behalf or in respect of such clerk, apprentice, or servant, to or for the benefit of the master or mistress, to or with whom such clerk, apprentice, or servant was put or placed." And by the 32d section a duty is imposed of sixpence in the pound upon premiums not exceeding 50*l.*, and one shilling in the pound upon premiums exceeding that sum.

trial granted, on the ground that the plaintiffs had not made out their case as required by the statute, so as to entitle them to give the indenture in evidence at the trial.

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Mr. Serjeant *Cross* now shewed cause.—By the title and preamble to the statute 8 *Anne*, c. 9, it appears that it was a mere temporary act, and passed for the purpose of raising a supply for the year 1710. It must therefore be taken to have been in force for that year only, and consequently the clause in question has long since been obsolete, and more particularly so, as several statutes have since been passed, by which the duties on indentures of apprenticeship have been repealed and regulated. That statute did not prescribe the time or place at which the oath was to be taken, nor did it even require it to be reduced into writing. Here it could not be required to be taken at the trial, as it would have the effect of making the plaintiffs witnesses in their own cause. In *Dr. Bonham's case* (a), Lord *Coke* says, that “in many cases the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.” And he refers to the statute of *Carlisle*, 35 *Edw.* 1, in support of that position, and which is directly applicable to this case, as the statute is so far repugnant to principle as to require a party to be examined in his own cause; and it is altogether vague, as it does not prescribe by whom the oath is to be administered, or when to be taken. As the stamp is to be regulated by the premium paid, the oath is in all probability taken at the stamp office; and more particularly so, as the payment of the duty is secured by a penalty of 50*l.* under the statute 9 *Anne*, c. 21; and by the 55 *Geo.* 3, c. 184, Sched. Part I,

(a) 8 Rep. 118. a.

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an *ad valorem* duty is imposed on indentures of apprenticeship, viz. if the sum paid to the master in respect of the apprentice shall not amount to 30*l.* One Pound, and if it shall amount to 30*l.* and not 50*l.* Two Pounds; and as the indenture in question was properly stamped with a 2*l.* stamp, the premium given being only 48*l.* it was sufficient proof of itself, without resorting to any other evidence, or the oath of the party. Here, however, three witnesses for the plaintiffs swore, that they saw no more than 48*l.* paid. That was far better proof than the plaintiffs themselves could be required to give, and might be substituted in the place of their oaths. Although by the mutiny act, an attested copy only, is made evidence of the examination of a soldier respecting his settlement, yet it was determined in *Hex v. Warley* (a), that on a reasonable and obvious construction of the act, the original examination, which was a higher kind of evidence, ought to be admitted as well as the copy. So, here, as the party was only required to make oath to the best of his knowledge or belief as to the sum paid to the master in respect of the apprentice, the testimony of others who saw it paid, is far better evidence than the oaths of the parties themselves.

Mr. Serjeant *Taddy* in support of the rule.—The statute 8 *Anne*, c. 9, has not fallen into disuse, nor was it passed for a mere temporary purpose, for all its provisions have since been continually acted on, and more particularly those respecting the duties imposed by the 36th and 45th sections, and by which an apprentice acquires a settlement by serving under the indenture. An objection, precisely similar to the present, appears to have been first taken in *Gye v. Felton* (b), and although the Court did not come to any decision upon it in that case, yet the words as well as the policy of the act shew that it ought

(a) 6 Term Rep. 534.—(b) 4 Taunt. 878.

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to be enforced, as the stamp alone does not denote the payment of the premium or full consideration money given with the apprentice. The doctrine in *Dr. Bonham's* case applies only where a statute requires an impossibility, or something that cannot be complied with, as if it gives a man power to try all causes before him that arise within his manor of *Dale*; yet if a cause should arise, in which he himself is a party, the act cannot extend to that, because it is unjust that any man should be a judge in his own cause. By the 37th section of the statute, indentures are required to be sent to the head office or collectors duly appointed, within two months after the date and execution thereof, when the duty is to be paid, and the indentures stamped; and by the 38th section, such instruments, if executed at the distance of fifty miles from the bills of mortality, or more, must be sent to that office within three and six months from the date thereof, and, on being produced there, immediately stamped. By the 39th section, all indentures wherein the full sum received, paid, secured, or contracted for in relation to an apprentice, shall not be truly inserted, are declared to be void, and the apprentice incapacitated from being free of any city or town, or exercising his intended trade or employment. But the 43d section affords an additional, if not the only protection to the revenue to guard against fraud. It is impossible that the collector can know the actual sum or premium agreed on between the parties at the time of the execution of the indenture, and it would be difficult, if not impossible, to ascertain the precise sum paid without the oath of the party himself, and which is required to be made before the indenture can be given in evidence. It does not therefore follow that it must be made when the amount of the stamp is paid to the collector, or that it should be done at the stamp office. It might be taken before the collectors or a magistrate; but the terms of the statute may be complied with, if the party make such oath at any time

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before the indenture is given in evidence, and after the stamp has been impressed on it. The oath must be considered as an affidavit, or in the nature of the oath required to be made by the owner or master of a ship under the registry acts 26 Geo. 3, c. 60, ss. 10 & 15, and 16 Geo. 3, c. 31, s. 1; and although there are certain forms prescribed by those statutes, yet here, the oath, if made at the stamp office, should have been reduced into writing, and produced at the trial; if not, it might have been made before the Judge who tried the cause, as he would be fully empowered to administer it. Although the terms of the statute are equivocal as to what time the oath is to be taken, yet it expressly requires it to be done before the party can give the indenture in evidence. There is no ground for presuming that such an oath has been made, nor can it be dispensed with by the testimony of other witnesses; and it would defeat the object of the statute if it were not strictly complied with, as it affords the only means of protecting the revenue from that fraud which it was expressly intended to guard against.

Mr. Justice PARK.—The objection that has been raised in this case is *strictissimi juris*, and the Court will do all in their power to prevent its being carried into effect. Many points have been urged in the course of the argument for the plaintiffs to which I cannot accede, *viz.* that the statute on which the question arises has ceased to be in force; but it is well known that it ever has been, and is still recognized as an existing law. That branch of the argument therefore cannot avail; neither is there any solid weight in the objection, that the plaintiffs could not have been examined in Court at the trial. If a statute requires it, a plaintiff may unquestionably be examined. So, Courts of Equity, in granting an issue to be tried at law, frequently direct that a party to the suit shall be examined at the trial as a witness. Although these are to be considered as anomalies, yet I think

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the Court ought not to yield to the objection which has been pressed upon it against this verdict. It was first raised at the trial, where it was insisted that the indenture could not be read in evidence, unless the plaintiffs themselves had first made oath that the sum inserted in it as the premium paid with the apprentice, was all that was truly paid or contracted for in respect of such apprentice. It is singular, that from the time of passing the statute to this day, there is no case to be found, with the exception of *Gye v. Felton*, where such an objection has been taken; and that case was decided on another ground, and the Court expressed no opinion whatever on the point. I am disposed to agree with what fell from Lord *Kenyon* in *Leigh v. Kent* (a), where, in an action on the statute 21 Hen. 8, c. 13, to recover penalties for non-residence, it was objected that no affidavit had been filed, that the offence was committed in the county where the action was brought, and within a year before the bringing of it, pursuant to the terms of the statute 21 Jac. 1, c. 4; and his Lordship there said (b), "I think no such affidavit is necessary. It has never been usual to take that step. And though, where the words of an act of parliament are plain, it cannot be repealed by *non user*; yet where there has been a series of practice without any exception, it goes a great way to explain them where there is any ambiguity." The statute of *James* as clearly required an affidavit as the statute in question, but the Court would not give effect to the objection. There, however, it was not made until after verdict. But Mr. Justice *Buller* said, "after a long course of years, during which time it has not been the practice to file affidavits in such cases as that then before the Court, they would endeavour to get rid of the objection." Here, it appears to me, even from the line of argument adopted for the defendant, that the oath required was intended to be taken before the commissioners of stamps;

(a) 3 Term Rep. 362.—(b) *Id.* 364.

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and although it cannot now be presumed that it was done, yet a stamp is impressed on the indenture according to the amount of the premium paid, and which the statute expressly requires to be inserted therein; and the officer or collector of stamps can only ascertain such amount by the oath of the party requiring the stamp. It does not appear that any enquiry has been made as to the practice at the stamp office, or whether the collector or commissioners require an oath to be made as to the amount of the premium to be paid with the apprentice, before the indenture is stamped. I at first doubted whether it ought not to have been shewn at the trial that such an affidavit had been made or filed; but as that was not the way in which the objection was there taken, and as I observed before, it appears to be *strictissimi juris*, it ought not to avail, and consequently that this rule must be discharged.

Mr. Justice BURROUGH.—The objection at the trial was, that the indenture could not be read in evidence, until the plaintiffs had themselves first made oath as to the amount of the premium actually paid. I think they could not have been called on to do so at the assizes, as that was not the time or place where the oath ought to have been made. It appears to me that it should have been taken before the commissioners at the stamp office. Although this statute was passed in 1709, and a similar question must frequently have arisen at the sessions, or occurred at *Nisi Prius*, yet it appears that no objection was ever raised, except in the case of *Gye v. Felton*, and the argument of counsel in shewing cause against that objection, is exceedingly strong to shew that the oath ought to have been made at the stamp office. That appears to be the most convenient, as well as the most proper place. Can we then in this case presume that it was made there, if an objection were taken, so as to raise such a presumption? I think we may. The stamp on the indenture is consistent with the amount stated to have been paid by way of premium. The officer of stamps

must therefore have been satisfied that the indenture was obtained by proper means, before the stamp was impressed on it. Besides, the plaintiffs gave evidence of the sum actually paid. The jury might therefore fairly presume that the requisites of the statute had been complied with. The main, if not only exception to the general rule, that a party to the suit on the record cannot be a witness at the trial for himself, is in cases of actions against the hundred, where it is tolerated merely from necessity. No necessity however exists in this case to call on a party to make an oath at the trial of his own cause, when it is more reasonable to suppose that it was done at the time the stamp was put on the indenture, and we shall be doing no violence to any principle of law in supporting the verdict found for the plaintiffs. This rule must consequently be

Discharged.

NUNNEY v. HALL, Prisoner.

Tuesday,
Nov. 25th.

ON Mr. Serjeant *Lawes's* opposing the discharge of the defendant, who was brought up on the 15th instant under the Lords act; it appeared that a commission of bankruptcy had been issued against him since his arrest and imprisonment in this suit, and that his last examination was fixed for *Saturday* last. The Court ordered him to be remanded until this day, as they doubted whether they had then jurisdiction to discharge him, as his property was under the direction and control of the commissioners,

Where, on a prisoner's being brought up to be discharged under the Lords act, it appeared that a commission of bankruptcy had been issued against him since his arrest and imprisonment, and that he had not passed

his final examination, the Court ordered him to be remanded until such examination had taken place; and on being afterwards brought up, and it appearing that he had passed it to the satisfaction of the commissioners, and that a commission had been awarded accordingly, he was ordered to be discharged on inserting an assignment in his schedule to the plaintiff, of all his estate, title, and interest in the property therein mentioned, subject to the commission, and the payment or satisfaction of his debts under it.

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NUNNEY
v.
HALL.

and he was remanded accordingly. On being now again brought up, it appeared that he had passed his last examination on *Saturday*, to the satisfaction of the commissioners, and that a commission had been consequently awarded. Mr. Serjeant *Lawes*, however, submitted, that if the defendant had any interest, however remote, it must still be assigned to the plaintiff, and inserted in his schedule.

The Court accordingly directed the following assignment to be inserted, viz. "I, *Thomas Hull*, do hereby assign, transfer, and set over unto *William Nunney*, his executors, administrators and assigns, all my estate, right, title, and interest whatsoever, both at law and in equity, in the several premises and property mentioned in my schedule, or otherwise, or the produce thereof, subject to the commission of bankrupt lately issued against me, and the payment or satisfaction of my debts under the said commission."

On the prisoner's signing this, he was ordered to be

Discharged.

Thursday,
Nov. 27th.

HOPCRAFT v. FERMOR.

The Court ordered an attachment to issue against a party for non-performance of an award, the submission having been made a rule of Court, although he resided in *France*, where the copy of the award and rule on which the application was founded was served on him; on the ground, that the attachment was in the nature of a civil process, but it seems that it could not be available to the party suing it out.

Mr. Serjeant *Taddy*, on a former day in this Term, obtained a rule, calling on the defendant to shew cause why an attachment for contempt should not be issued against him, for non-payment of the sum of 925*l.* which had been awarded to be paid by him to the plaintiff; the submission having been duly made a rule of Court:—

Mr. Serjeant *Pell* afterwards shewed cause, on an affidavit which stated that shortly after the submission, the defendant had gone to reside at *Boulogne* in *France*, where he had been served with a copy of the award as well as a copy of the rule *nisi*, on which the present application was founded. The learned Serjeant submitted, that as the defendant was now living out of the jurisdiction of the Court, he could not be guilty of a contempt, so as to render himself amenable to its process, or liable to an attachment, which even if granted, the Court could not order to be enforced in a foreign country. The motion was not only of the first impression, but could not be supported on principle or by precedent; or at all events, it was an application to the discretion of the Court, who would not exercise an authority which would be ultimately unavailing, or cause process to be issued, which would be altogether nugatory and useless.

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HOPCRAFT
v.
FERMON.

Mr. Serjeant *Taddy* in support of the rule, contended that the question was not, whether the attachment could be enforced or not, but whether the defendant had been guilty of a contempt, so as to warrant the Court in issuing it? As he had not left the country at the time the present suit was commenced against him or submission entered into, he was then clearly before the Court; and if a party be once before them, they may direct the proceedings to be carried on; and as the defendant has refused to perform or comply with the terms of the award, there can be no doubt but that he is in contempt, the submission having been duly made a rule of Court. The statute 9 & 10 *Will. 3*, c. 15, was passed for the purpose of putting submissions, where no cause was depending in Court, on the same footing with those where a cause was pending; and the intention of the Legislature was to secure the fruits of an award in instances of disobedience by the party in the one case as well as the other, and thereby sub-

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HOPCRAFT
v.
FRANCO.

ject him to the same penalties as if he were actually in Court. Although the arm of the Court may not reach the defendant in this particular instance, he is still in contempt, and bound to comply with the terms of the award, not only *ex debito justitiæ*, but by the terms of the statute. He has been served with the notice of the rule as well as the copy of the award, and if the Court allow the attachment to issue, it will be ready to be served on him in case he should return to this country; and if it be not granted, it will have the effect of allowing a party after an award has been made against him, to go immediately to *Scotland or Ireland*, and thereby avoid complying with the terms of it, or performing it in any manner whatever.

The Court deeming it to be a new point, took time to consider; and on this day

Mr. Justice PARK said, this was an application for an attachment against the defendant for non-payment of money under an award, and it was objected that the Court could not allow it to issue, as he was resident in *France*, and as a copy of the award and rule on which the application was founded had not been served on him in this country. We have considered the question, and are of opinion that this attachment must go, for it is not in the nature of a criminal, but merely a civil process, and the defendant has been served with a copy of the rule *nisi* as well as the award, and there is no doubt but that a demand of the payment of the money was duly made at the time. Although that was not done in this country, yet as he was served with the proceedings, the rule must be made absolute;—but whether it can be available to the plaintiff or not, it is not for us to enquire.

Rule absolute.

1823.

BLIOKE v. DYMOKK.

Thursday,
Nov. 27th.

THIS was an action of covenant. The declaration averred that the defendant covenanted by deed, that his first son or other heir male of his body who should first attain twenty-one, should at the request of the plaintiff, well and effectually convey and assure certain premises to the plaintiff by such common recovery, fine, or other assurance, as counsel should advise; and assigned for breach, *first*, that the defendant did not, when he was requested, cause his first son or heir male to suffer such recovery; and *secondly*, that the defendant would not, although requested, cause the premises to be conveyed and assured to the plaintiff. The defendant, being under terms of pleading issuably, filed a special demurrer to both these breaches; assigning for causes, *first*, that it did not appear on the face of the declaration, that either the defendant or his son or heir had such an estate in the premises, as to warrant the plaintiff's calling on them to suffer the recovery; and *secondly*, that the plaintiff himself had shewn that he had the first estate or title to the freehold, and therefore that he should have suffered the recovery in the first instance.

If a defendant be under terms of pleading issuably, he cannot assign special causes of demurrer, although the causes assigned are matters of substance, and of which he might have availed himself under a general demurrer.

Mr. Serjeant *Bosanquet*, on a former day in this Term, obtained a rule *nisi*, that the plaintiff might be at liberty to sign judgment, unless the defendant would strike out the special causes of demurrer.

Mr. Serjeant *Taddy* now shewed cause, and submitted, that there was a distinction between a real and fair demurrer and a demurrer without good cause, and that the former must be considered as an issuable plea within the meaning of the order. Here, the causes assigned in the demurrer not only went to the form, but to the substance of the

1828.
BLICK
v.
DYMOKK.

declaration, and of which the defendant might have availed himself upon a general demurrer; and if so, it is quite clear that it must be treated as an issuable plea. This case is therefore distinguishable from those of *Berry v. Anderson* (a), and *Bell v. Da Costa* (b), as the former did not go to the merits of the cause, and might have been either frivolous or filed for delay, and the latter was a mere mistake as to form, by the plaintiff's omitting the name of one of the partners in a firm in his replication, which had been inserted in the defendant's plea, and which was a mere technical objection.

But the Court were clearly of opinion that the special causes of demurrer assigned by the defendant could not be considered as an issuable plea within the meaning of the order, which must be a plea in chief to the merits, and upon which the plaintiff may take issue and go to trial. If the defendant had considered the declaration to be bad in substance, he should have demurred generally; and the cases of *Berry v. Anderson*, and *Bell v. Da Costa*, are decisive to shew that a defendant who is under terms to plead issuably, cannot take advantage of any objections upon special demurrer which do not go to the merits, or of which he could not have availed himself upon a general demurrer. Unless, therefore, the defendant will undertake to strike out those special causes of demurrer, the rule must be made

Absolute (c)*.

(a) 7 Term Rep. 530.—(b) 2 Bos. & Pul. 446.—(c) See *Newham v. Dowding*, 1 Chit. Rep. 711.

* The defendant afterwards struck out the special demurrer, and demurred generally, and the cause was set down for argument in the next Term.

1823.

Friday,
Nov. 28th.

DILLAMORE v. CAPON.

The plaintiff and defendant must be both resident within the jurisdiction of the South-wark Court of Requests act, 22 Geo. 2, c. 47, in order to deprive the plaintiff of his costs under the 6th section of that statute.

THIS was an action of *assumpsit*. The declaration stated, that in consideration that the plaintiff, at the request of the defendant, would deliver to him a certain horse of the plaintiff's in exchange for a certain horse of the defendant's, the latter undertook to deliver his horse to the plaintiff, and pay him 30*l.* in exchange for the plaintiff's horse. It was then averred, that the plaintiff accordingly delivered his horse to the defendant, and that although the defendant delivered his horse in exchange for the plaintiff's, yet that the defendant would not pay the said sum of 30*l.*, but altogether refused so to do. To this was added the common money counts.—Plea, *non assumpsit*.

At the trial before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last *Easter* Term, the plaintiff proved the delivery of his horse to the defendant; and the servant who delivered him, stated that he was perfectly sound, and that the defendant's horse which was taken in exchange was worth 10*l.* only. The plaintiff's horse having died three days after it had been delivered to the defendant, he refused to pay the 30*l.*, and for the recovery of which this action was brought. A witness was called to prove that the horse was in a diseased state at the time of the sale, and must have been so for some months previously. But it appeared that the defendant had sold the carcass and skin for a guinea and a half. The jury being of opinion that the plaintiff's horse was unsound at the time of the delivery, found a verdict for the defendant. Leave, however, was given the plaintiff to move to set it aside, and that a verdict might be entered for him for 1*l.* 11*s.* 6*d.* being the sum the defendant had received for the skin and carcass.

Mr. Serjeant *Pell*, in the last Term, having accordingly

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obtained a rule *nisi*, to that effect, or that a new trial might be granted, when the person who sold the horse to the plaintiff in the first instance, might be examined as to his soundness.

Mr. Serjeant *Vaughan*, on a former day in this Term, obtained a rule, calling on the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion on the roll, under the statute 22 Geo. 2, c. 47, s. 6, (the *Southwark* Court of Requests act *), and why the plain-

* That act is intituled "an act for the more easy and speedy recovery of small debts within the town and borough of *Southwark*, and the several parishes of *St. Saviour*; *St. Mary* at *Newington*; *St. Mary Magdalen*, *Bermondsey*; *Christ Church*; *St. Mary, Lambeth*; and *St. Mary* at *Rotherhithe*, in the county of *Surrey*, and the several precincts and liberties of the same;" and by the 4th section it is enacted, "that from and after the 29th September, 1749, it shall and may be lawful to and for every resiant and inhabitant of the said town and borough of *Southwark*, and for all the resiants and inhabitants within the said several parishes of *St. Saviour*, &c. &c. (as enumerated in the title), and to and for all and every person and persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood within the said town or borough, or within any of the parishes, limits, or precincts aforesaid, who now have, or hereafter shall have, any debt or debts owing unto him, her, or them, not exceeding the sum of 40s., by any person or persons whatsoever, inhabiting or seeking a livelihood, within the said town and borough, or within any of the parishes, limits, or precincts aforesaid, as aforesaid, to cause such debtor or debtors so inhabiting or seeking a livelihood as aforesaid, to be warned or summoned by the chief bailiff of the said town and borough for the time being, or his deputy officer or officers (who are hereby appointed, authorized, and required to execute all warrants, precepts, or process of the said Court of Requests), by writing left at the dwelling-house or place of abode, shop, shed, stall, stand, or any other place of dealing of such debtor or debtors, or by any other reasonable warning or notice, to appear before the commissioners of the said Court, to be held at or in the place aforesaid, and that the said commissioners or any three or more of them, shall after such summons as aforesaid have full power and authority, by virtue of this act, to make or cause to be made such acts, order or orders, decrees, judgments, and proceedings between such party or parties, plaintiffs, and

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tiff should not lose his costs of the action, and pay them to the defendant together with the costs of this application. He founded his motion on an affidavit, which stated that the defendant resided in the parish of *St. Mary Lambeth*, and within the jurisdiction of the *Southwark* Court of Requests.

his, her, or their debtor or debtors, defendants, touching such debts not exceeding the sum of 40s. in question before them, as they shall find to stand with equity and good conscience; and all such acts, decrees, judgments, and proceedings, order or orders, shall be entered and registered in a book to be kept for that purpose by the clerk or clerks of the said Court, or his or their sufficient deputy or deputies; and shall be observed, performed, and kept in all parts as well by the plaintiff as the debtor or defendant." And for the more due and regular proceeding in the said Court intended to be established by this act, it is by the 5th section further "enacted, that it shall and may be lawful for the said commissioners, or any three or more of them, to administer an oath to the plaintiff or defendant, and to such witness or witnesses as shall be produced by each party, and also to all the officers of the said Court, for or concerning any business relative thereunto, if the same commissioners or any three or more of them shall so think it meet." By the 6th section it is further enacted, "that if any action of debt or action on the case upon an *assumpsit* for recovery of any debt to be sued or prosecuted against any person or persons aforesaid, in any of the King's Courts at *Westminster*, or elsewhere out of the said Court of Requests, it shall appear to the Judge or Judges of the Court, where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff in such action doth not amount to the sum of 40s., and the defendant in such action shall duly prove by sufficient testimony to be allowed by the Judge or the Judges of the said Court where such action shall depend, that at the time of commencing such action, such defendant was inhabiting and resident within the said town and borough of *Southwark*, or any of the parishes, limits, and precincts aforesaid in the county of *Surrey*, and was liable to be warned or summoned before the said Court of Requests for such debt, then and in such case the said Judge or Judges shall not allow to the said plaintiff any costs of suit, but shall award that the said plaintiff shall pay so much ordinary costs to the party defendant, as such defendant shall justly prove before the said Judge or Judges it hath truly cost him in the defence of the said suit."

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Mr. Serjeant *Pell* afterwards shewed cause, and submitted, that the *first* question was, whether under the circumstances, this case fell within either of the provisions of the statutes 22 *Geo.* 2, and 46 *Geo.* 3? *Secondly*, whether the parties from their situation were within the reach of those statutes? and *lastly*, whether the defendant should not have applied for a certificate to the Judge before whom the cause was tried, and not by a motion to the Court? In order to bring the parties within the provisions of the statute 22 *Geo.* 2, c. 47, both the plaintiff and defendant must reside within the jurisdiction of the *Southwark* Court. But that statute, as far as regards the present action, was repealed by the 46 *Geo.* 3, c. 87; as there was no debt which could be demanded, but a mere litigated dispute between the parties as to the soundness of the horse; and the plaintiff sought to recover unliquidated damages for a breach of contract. The demand for a debt under 5*l.* as mentioned in that statute applies only to money debts, and where the sum demanded does not exceed 5*l.* Although the 6th section of that statute enacts that it shall be lawful for any person to sue, whether residing within the borough of *Southwark* and the eastern half of the hundred of *Brixton* or *elsewhere*, yet those latter words must be restricted to the parishes or places to which the statute was intended to apply, *viz.* to the several parishes enumerated in the other acts, and which were not introduced in the latter statute. The present application cannot avail the defendant, as by the 13th section of the 46 *Geo.* 3*, he should have applied for a certificate to the

* By the 46 *Geo.* 3, c. lxxxvii. intituled "an act to explain, amend, and render more effectual two acts passed in the 22d (a) and 39d (b) *Geo.* 2, for the more easy and speedy recovery of small debts, within the town and borough of *Southwark* and the several parishes and places in the said acts mentioned," it is enacted by section 13, "that if any action or suit shall be commenced in any of his Majesty's Courts of record at *West-*

(a) C. 47.—(b) C. 6.

Judge who tried the cause, which, if granted, would entitle him to double costs. But even that clause has been since repealed by the 4 Geo. 4, c. cxxiii. s. 16; and although that statute was not passed until after the commencement of the present suit, yet it was in full force previously to this application, and is consequently conclusive against it.

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Mr. Serjeant *Vaughan* in support of the rule. The two latter statutes are entirely out of the question, and that of the 22 Geo. 2, is alone applicable. As to the plaintiff's cause of action, although the soundness of the horse was disputed, yet the 11. 11s. 6d. was a distinct debt due from the defendant to the plaintiff, for money had and received to his use for the carcass of the horse, and was tendered to him before the action was brought. The defendant is therefore clearly entitled to a suggestion, under the 22 Geo. 2, instead of going for double costs, as provided by the 46 Geo. 3, c. 87; and the 4 Geo. 4, c. 123, was passed too recently to affect any proceedings in this cause, as it had been previously commenced. It is sufficient for the purposes of the 6th section of the 22 Geo. 2, for the defendant alone to reside within the jurisdiction of the Court. The 46 Geo. 3, merely extends the jurisdiction to 5l., and entitles the defendant to double costs, on a verdict found for him in case the Judge shall certify, but even that clause has been since repealed. As far therefore

minster, for any debt not exceeding the sum of 5l., and recoverable by virtue of the said recited acts and of this act, or any or either of them, in the said Court of Requests, then and in every such case, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action or suit, and the Judge or Judges before whom the same shall be tried or heard shall think fit to certify that such debt ought to have been recovered in the said Court of Requests, then and so often such defendant or defendants shall have double costs, and shall have such remedy for recovering the same as any defendant or defendants may have for his, her, or their costs in any case, by law."

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as regards this question, the 22 Geo. 2, remains in full force, is still operative, and must be considered as an existing act.

Cur. adv. vult.

Mr. Justice *Park* on this day delivered the judgment of the Court as follows:—This was an application by the defendant for leave to enter a suggestion on the roll, for the purpose of depriving the plaintiff of his costs, on the ground that the verdict being under forty shillings, the action ought to have been brought in the *Southwark* Court of Requests, under the statute 22 Geo. 2, c. 47, s. 6, but we are of opinion that under the circumstances we ought not to accede to the application. Although it has been contended for the plaintiff, that the statute 22 Geo. 2, c. 47, is repealed, as far as regards costs, by the 46 Geo. 3, c. 87, yet we think that it was not. The title of the latter act is “an act to explain, amend, and render more effectual two acts passed in the 22d and 32d Geo. 2, for the more easy and speedy recovery of small debts, within the town and borough of *Southwark*, and the several parishes and places in the said acts mentioned.” By that act, the jurisdiction of the Court as to its locality was extended, as well as the amount of the debt sought to be recovered; and as the 22 Geo. 2, was limited to the town and borough of *Southwark*, and the adjacent parishes, and did not include those of *Streatham*, *Clapham*, and *Camberwell*, being the remaining part of the eastern half of the hundred of *Brixton*, and was confined to the recovery of debts not exceeding forty shillings, it was extended by the 46 Geo. 3, under certain provisions and regulations therein expressed, to the sum of 5*l*. But the point on which we are about to decide this case, and which never appears to have been taken in any of those which have been determined on the construction of the *Southwark* acts, is that both the plaintiff and defendant must reside within the

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district over which the jurisdiction of that Court extends. As far as regards the jurisdiction, the words of the *London* Court of Requests act, 14 Geo. 2, c. 10, are, if not precisely similar, to the same effect as those used in the 22 Geo. 2, c. 47. And in *Webb v. Brown* (a), it was determined that the statute 14 Geo. 2, c. 10, only applied to cases where both the plaintiff and defendant were residing within the jurisdiction of the *London* Court of Requests. So, by the statute 22 Geo. 2, c. 47, s. 4, it was enacted, "that from and after the 29th September, 1749, it should be lawful for every *resiant and inhabitant* of the town and borough of *Southwark*, and the *resiants* within the parishes therein named, and all and every person and persons renting or keeping any shop, stall, &c. or seeking a livelihood within the said town, borough, or parishes, who should have any debt owing to him or them, (the plaintiffs), not exceeding 40s., by any person inhabiting or seeking a livelihood within the said town, &c. to cause such debtor to be summoned before the commissioners of the Court; and by the 5th section, the commissioners are empowered to administer an oath to the plaintiff or defendant. Coupling both these clauses together, they must be taken to require both the plaintiff and defendant to be *resiant* within the jurisdiction of the Court. Although it may be said that a distinction may be drawn between the *London* and *Southwark* acts, as the former contains one clause only as to the jurisdiction and giving power to the commissioners; yet the 4th and 5th sections of the latter may be considered as one in effect, as the 5th merely empowers the commissioners to administer an oath. It has been contended, however, that the 46 Geo. 3, c. 87, has made some difference in this respect, as the enacting part of the 6th section has given a privilege of suing in the *Southwark* Court of Requests, to all persons residing within that town or borough, and the eastern half of the hun-

(a) 5 Term Rep. 535.

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dred of *Brixton* or *elsewhere*; or that, at all events, it has had the effect of repealing the 22 *Geo. 2*, c. 47, *pro tanto*; and that a plaintiff may bring his action wherever he may reside. But we are of opinion that he cannot. The 46 *Geo. 3*, having mentioned all the parishes and places enumerated in the 22 *Geo. 2*, c. 47, goes on to recite in the preamble, "that it would greatly tend to the improvement and encouragement of trade in the said town and borough of *Southwark*, and the eastern half of the hundred of *Brixton*, and to the necessary support and protection of useful credit within the same, if the powers of the said Court under the said two recited acts of parliament were extended to the recovery of small debts not exceeding 5*l.*," and then proceeds to enact, that it "shall and may be lawful for any person or persons to sue, whether residing within the said town or borough of *Southwark*, and the said eastern half of the hundred of *Brixton*, or elsewhere:" that is, elsewhere within the parishes before enumerated in the statute 22 *Geo. 2*, c. 47. This appears to us to be the true construction of both these statutes; and by adopting it, we shall not violate any principle, and no decision appears to militate against it. This rule therefore must be

Discharged (a).

(a) Mr. Serjeant *Vaughan* then applied to Mr. Justice *Park* to certify, under the 46 *Geo. 3*, c. 87, s. 13, which was refused; the defendant having made his election by applying to the Court for the suggestion, according to the 6th section of the 22 *Geo. 2*, c. 47.

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YOUNG v. GADDERER.

Friday,
Nov. 28th.

THIS was an action against the defendant, as acceptor of a bill of exchange for 37*l.*, to which he pleaded a judgment recovered for the same debt.

Where in an action against the defendant, as acceptor of a bill of exchange, he pleaded a plea of judgment recovered for the same debt, the Court refused to set it aside as being a sham plea, or permit the plaintiff to sign judgment, although it was sworn that the defendant had admitted the debt, and made repeated promises to the plaintiff to pay, after he had been served with process in the action.

Mr. Serjeant *Pell* applied for a rule to shew cause why this plea should not be set aside, or that the plaintiff might be at liberty to sign judgment as if no plea had been pleaded, and that the defendant might pay the costs of this application. He founded his motion on an affidavit, which stated that the defendant, after he had been served with process, frequently admitted the above sum to be due to the plaintiff, and was desirous of coming to a settlement. That during the Term he had repeatedly promised to pay, and did not file the above plea until the 25th instant, he having succeeded in gaining time by such promises to pay. The learned Serjeant submitted, that under the circumstances this must be considered as a sham plea, and he relied on the case of *Richley v. Proone* (a), where, to a declaration of *assumpsit* for use and occupation, the defendant pleaded, that after the making of the promises, and after the cause of action accrued, and before the exhibiting of the plaintiff's bill, the defendant delivered to the plaintiff certain goods, in full satisfaction and discharge of the promises in the declaration, which the latter accepted in satisfaction. The plea being in every respect false, the Court permitted the plaintiff to sign judgment as for want of a plea. And in *Shadwell v. Berthoud* (b), where a sham plea was ingeniously drawn, the Court, on an affidavit that it was wholly false, permitted the plaintiff to

(a) 1 Barn. & Cress. 286. S. C. 2 Dow. & Ry. 661. — (b) 5 Barn. & Ald. 750. S. C. 1 Dow. & Ry. 446.

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sign judgment as for want of a plea, and ordered the defendant or his attorney to pay the costs.

Mr. Justice PARK.—It appears to me that there is no ground to induce the Court to interfere. The plea put upon the record, is the common plea of a judgment recovered; and which is an ordinary defence, and we are not to assume that it is false. The principle on which the Court of King's Bench has generally acted in cases of this description is, that if a false plea be calculated to raise issues requiring different modes of trial, or is so ingeniously drawn as to perplex the plaintiff, or make it necessary for his attorney to consult counsel, and thereby cause delay and expence, the plaintiff may sign judgment. In *Solomons v. Lyon* (a), where the plaintiff in his replication improperly concluded to the country, the Court allowed him to amend without payment of costs, the defendant having admitted that he had pleaded a sham plea; and the Court there discountenanced the practice of sham pleading. In *Thomas v. Vandermoolen* (b), where a sham plea was pleaded, which was calculated to raise issues requiring different modes of trial, viz. a judgment recovered to some counts, and payment to others, the Court not only permitted the plaintiff to sign judgment, but ordered the defendant or his attorney to pay the costs. And in *Bartley v. Godslake* (c), where, to an action on a bill of exchange, the defendant pleaded, that, in satisfaction of part of the plaintiff's claim, the defendant had indorsed to him a bill of exchange, and had assigned to the plaintiff a judgment obtained by the defendant in the Court of *Backequer* in *Ireland*, in satisfaction of the residue, the Court said that, "it being an ingenious plea, which the plaintiff's attorney could not be expected to understand, it would put him to the necessity of consulting counsel, and thereby occasion

(a) 1 East, 360.—(b) 2 Barn. & Ald. 197.—(c) *Id.* 199.

delay and expence:" and they directed the defendant's attorney to pay the costs. — Here, however, only one issue is raised by the plea, and which is very frequently, if not usually adopted; and in *Bones v. Punter* (a), where the defendant pleaded two pleas requiring different modes of trial, the Court required an affidavit that the pleas were false. In *Richley v. Proone*, the rule for the plaintiff to sign judgment was obtained on an affidavit stating that the plea was in every respect false; and in the late case of *Merington v. Becket* (b), although such an affidavit was made, the Court would not compel the defendant to verify his plea; and Lord Chief Justice *Abbott* said (c), "that, calling upon the attorney to shew by what authority he put a sham plea upon the file, might not be effectual; and that the Court would consider whether some means could not be adopted for the prevention of sham pleading, without breaking in upon any established principle. But, that in the mean time, and until some such regulation could be devised, the practice must remain as it had been heretofore." — Here, however, there was no affidavit that the plea was false, and even if there had been, it appears that it would not have been sufficient to entitle the plaintiff to sign judgment as for want of a plea.

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Mr. Justice BURROUGH.—The Court must adhere to their former and established practice, and not introduce a new rule on a motion of this description, which at all events they have a discretion to grant or not. The true principle has been laid down by my Brother *Park*, viz. that a false plea must be either calculated to raise issues requiring different modes of trial, or be so artificially drawn as to put the plaintiff to expence or delay.

Rule refused (d).

(a) 2 Barn. & Ald. 777; S. C. 1 Chit. Rep. 504. — (b) 2 Barn. & Cress. 81; S. C. 3 Dowl. & Ry. 231. — (c) 2 Barn. & Cress. 82.
 (d) See *Hill v. Dyball*, 2 Chit. Rep. 229.

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Friday,
Nov. 28th.

HUDSON and Another v. MARJORIBANKS.

Where the plaintiffs in an action on a policy of assurance recovered for an average loss, and a new trial was granted on the terms that the costs of the first should abide the event; and at the second trial, the plaintiffs again recovered for an average loss only:—Held, that they were only entitled to the costs of the latter trial, and the defendant to the costs of neither.

THIS was an action of *assumpsit* on a policy of assurance, against a loss by perils of the sea, on goods in the ship *Swallow*, on a voyage from the *Cape of Good Hope* to *Bristol*. The cause was first tried before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after *Hilary* Term, 1822, when the jury found a verdict for the plaintiffs for an average loss; and in the *Easter* Term following, a rule nisi was obtained for a new trial, on payment of costs, which was afterwards made absolute; and the costs of the first trial were ordered to abide the event. At the second trial, at the Sittings after *Michaelmas* Term, 1822, the jury again found a verdict for the plaintiffs, for an average loss only, subject to a reference to an arbitrator to determine the amount of such loss. Another application was made for a new trial in the last *Hilary* Term, on the ground that it should have been left to the jury to determine, whether the expences of the sale of the damaged cargo should be borne by the underwriters or not; which the Court refused, as that fact was in the discretion of the arbitrator, by whom the amount of the loss was to be ascertained (a). The Prothonotary, on the taxation of costs in the course of the present Term, allowed the plaintiffs the costs of the last trial only, and refused to allow the defendant any costs incurred by him on the first, unless the Court should be of opinion that he was entitled to them, or would make an order to that effect.

Mr. Serjeant *Taddy* having accordingly obtained a rule, calling on the plaintiffs to shew cause why the Prothonotary should not tax the defendant his costs of the

(a) See *ante*, Vol. VII. 463.

first trial, on the ground that the only question between the parties was, whether the plaintiffs were entitled to recover as for a total loss with benefit of salvage, or for an average loss only, and the jury having found for a mere average loss on both trials, the defendant was entitled to the costs of the first, as the plaintiffs were secure of a verdict at all events in the second, and they ultimately recovered no more than they originally obtained in the first.

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HUDSON
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Mr. Serjeant *Vaughan* now shewed cause, and premised that the plaintiffs had in the first instance commenced an action against another underwriter on the same policy, and under the same circumstances as those in which they sought to recover against the present defendant, and in which they had succeeded in establishing a total loss. *Hudson v. Harrison (a)*. That no consolidation rule having been entered into, they accordingly commenced another action against the present defendant, and recovered only an average loss. That they were afterwards prepared to shew certain additional facts which were not proved at the trial, and which would have entitled them to recover as for a total loss, unless the defendant had adduced evidence on the second trial, to shew that the cargo was not so much deteriorated as it was represented to have been on the former trial. The defendant should, under the circumstances, have paid money into Court, as the plaintiffs were entitled to a verdict at all events; and as they succeeded in both trials, and the costs were ordered to abide the event, the Prothonotary has exercised a sound discretion, and taxed the costs accordingly.

Mr. Serjeant *Taddy*, in support of the rule, insisted that as the plaintiffs sought by the second trial to set aside their own verdict, and recover more than they had

(a) *Ante*, Vol. VI. 288.

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BARKS.

done on the first, but had failed in so doing, the event was clearly against them. The defendant could not be entitled to a verdict, nor could he have paid money into Court, as no adjustment had been made. The event was to depend on the question, whether the plaintiffs should be ultimately entitled to recover as for a total or average loss; and not the mere legal event of the suit; and as they recovered no more on the last trial than on the first, the defendant must be considered to have succeeded in the one and the plaintiffs in the other, and if so, the defendant is entitled to his costs of the former trial.

Mr. Justice PARK. — This case is singular in its circumstances, but it appears to the Court that justice has been done by the Prothonotary. What are the facts? The plaintiffs originally obtained a verdict against another underwriter, on the same policy, for a total loss. They then commenced an action against the defendant, and recovered an average loss only, which being dissatisfied with, and on producing an affidavit to the Court, stating that they had additional facts which they were unable to prove at the former trial, a new trial was granted on payment of costs, which were directed to abide the event. If the plaintiffs had applied for the costs of both trials, it would be unjust, as they sought to set aside their own verdict in the first instance. The Prothonotary therefore has most properly exercised his discretion by allowing them the costs of the second trial only, and giving neither party the costs of the former, by which he has put them in the same situation as if a *stet processus* had been entered as to the first.

Mr. Justice BURROUGH concurring —

Rule discharged.

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REDFERN and Others v. SMITH, Widow.

Friday,
Nov. 26th.

THIS was an action in the nature of a writ of waste, on the statute of *Gloucester*, 6 *Edw.* 1, c. 5, for waste, sale, and destruction committed by the defendant in felling timber trees on an estate, situate in *Church Gressly*, in the county of *Derby*, and converting them to her own use, she being tenant *durante viduitate*, the reversion thereof belonging to the plaintiffs. Plea.—No waste, sale, or destruction.

At the trial before Mr. Baron *Garrow*, at the last assizes for *Derbyshire*, the plaintiffs proved that the defendant was tenant for life under the will of her late husband, that she at the time the action was brought continued his widow, and that the reversionary interest was in the plaintiffs. It was also proved that the estate consisted of between thirty and forty acres, and that the defendant had ordered trees, consisting of ash and elm, to be felled since the death of her husband, to the amount of 37*l.*, and that all the trees on the estate were valued at from 50*l.* to 55*l.* That the trees had been cut by the defendant's orders at three different times, the first about fifteen, the second about ten, and the last about four years before the commencement of the present action; and on a cross-examination of the plaintiffs' witnesses, they admitted that most of the trees had been cut down for the purpose of preserving others growing near them, and for the benefit and improvement of the estate. The defendant called no witnesses, and the learned Baron left it to the jury to say, whether they thought, from the evidence of the plaintiffs' witnesses, the felling of the trees by the order of the defendant had been injurious to the plaintiffs' reversionary interest: if so, that they should find a verdict for them. But that if they were of opinion that she ordered

Where, in a writ of waste founded on the statute of *Gloucester*, 6 *Edw.* 1, c. 5, it appeared that the defendant, a tenant for life, had cut down trees on the estate at three different times, the last of which was more than four years before the writ was sued out, and the plaintiffs' witnesses admitted, that several of such trees had been felled for the benefit of the estate, and it was left to the jury to say, whether they thought the felling of the trees had been injurious to the inheritance, and if so, that they should find a verdict for the plaintiffs; but that if they should be of opinion that they were cut down *bond fide*, and with a view to improve the estate, then for the defendant; and the jury accordingly found

a verdict for the latter, the Court granted a new trial.

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SMITH.

them to be felled *bond fide*, and with a view to improve the estate; then that they should find for the defendant: and that if they had any doubt as to the evidence, they would consider whether the actual proprietor of the estate would have acted as the defendant had done.

The jury found a verdict for the defendant.

Mr. Serjeant *Pell*, on a former day in this Term, obtained a rule *nisi*, that it might be set aside, and a new trial granted: *first*, on the ground of a misdirection to the jury; and *secondly*, that the verdict was against evidence.

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Bosanquet*, now shewed cause, and submitted, that there had been no misdirection, as the felling the trees had been proved by the plaintiffs' own witnesses to be rather beneficial to the estate than otherwise; and as the action was penal in its nature, and in which the plaintiffs sought to recover the place wasted as well as treble damages, the Court would not disturb the verdict or send the cause down to a new trial, although the jury might have been guilty of a mistake, or their verdict might have been against the weight of evidence. In *Wilson v. Rastall*, Lord *Kenyon* said (a), "that where the jury have formed an opinion on the whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion: so too, in ordinary, where the damages are small, and the question too inconsiderable to be re-tried, the Court has frequently refused to send the case back to another jury." And in *Brook v. Middleton*, Lord *Ellenborough* said (b), "that in case of a verdict found for a defendant against evidence in a penal action, the rule was now settled that no new trial would be granted." So, in *Reavely v. Mainwaring*,

(a) 4 Term Rep. 758.—(b) 10 East, 269.

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the Court refused to grant a new trial in a hard case; and Lord Mansfield there said (a), "that he thought the jury ought to have found the defendant guilty upon the evidence that was laid before them; yet, that it would have been very hard, if he had suffered for his behaviour upon that particular occasion, because he seemed to have acted with good intentions." In *Rex v. Mann*, Mr. Justice Dampier said (b), "in penal actions, where the verdict is for the defendant, the Court, I believe, do not grant a new trial, except for a misdirection of the Judge." Here, however, the jury did not come to a wrong conclusion on the facts before them, as, from the length of time that elapsed from the period of cutting down the trees, to the suing out the writ by the plaintiffs, it may be fairly presumed, either that their claim had been satisfied, or that they had waived the forfeiture. Besides, it was not shown that the trees felled were timber, and in many instances where there are twin stocks, it is absolutely necessary to take out one in order to give room to the other, and which would be highly beneficial to the land, as well as to the trees left for timber. The plaintiffs might have had their remedy by an action of trover, or for money had and received, or by an action on the case in the nature of waste; instead of which, they allowed a period of twenty years to pass by, and then sued out their writ on the statute, and offered evidence of all acts committed by the defendant which might amount to waste, from the time she first came into possession of the estate; although she had ordered no trees to be felled within four years from the commencement of the action. That this statute is highly penal, is quite clear from the language of Lord Coke (c), and it cannot be contended for a moment, but that the present proceeding is of a hard nature, as no injury was proved to have been done to the inheritance. It is stated

(a) 3 Burr. 1508.—(b) 4 Manl. & Selw. 338.—(c) 2d Inst. 307.

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by *Bracton* (a), that *vastum erit injuriosum, nisi vastum ita modicum fuerit, propter quod non sit inquisitio facienda*. And in the case of the *Keepers and Governors of Harrow School v. Alderton* (b), where, in an action of waste on the statute against tenant for years, for converting three closes of meadow into garden ground, and the jury gave only one farthing damages for each close, the Court permitted the defendant to enter up judgment for himself. In *Barret v. Barret*, Lord Chief Justice *Richardson* said (c), "that the law would not allow that to be waste, which was not any ways prejudicial to the inheritance." Here, the question did not turn on the value of the trees at the time they were cut, or for what they were actually sold; and unless the cutting of them was actually waste at the time they were felled, the plaintiffs were not entitled to recover; and so far from its being waste, it was admitted that they were cut for the benefit of the inheritance. The verdict therefore was consonant to law and fact, and it would be too much to say, that a party having a mere reversionary interest, should be entitled to recover the place wasted, as well as treble damages, if an act by the tenant for life was done *bond fide*, and with a view to benefit the estate.

Mr. Serjeant *Pell* in support of the rule. Although it has been said that the writ of waste and statute on which it was founded are highly penal in their nature, and that the Court will not disturb a verdict found for the defendant in a penal action, except in the case of a misdirection by the Judge who tried the cause; yet in *Lord Selsea v. Powell* (d), which was an action of debt on the statute 2 & 3 *Edw. 6*, c. 13, for not setting out tithes,

(a) Lib. 4, c. 18, s. 12, fol. 316 (b).——(b) 2 Bos. & Pul. 86.
 (c) Hetley, 35.——(d) 6 Taunt. 297.

the Court considered that statute to be remedial, and granted a new trial for a mere mistake of the jury. So, in the case of *Hammond v. Webb* (a), the statute of *Gloucester*, which gives the writ of waste, and on which the present proceeding is founded, was considered to be remedial; and Mr. Serjeant *Salkeld* there stated in argument, that (b) "it was to be interpreted by equity, and that the act extended to waste *omittendo*, though the word in the statute was *faciant*, which literally imported active waste."

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But the Court doubting whether the whole of this case had been sufficiently or fully understood or gone into at the trial, they declined giving any conclusive opinion on the points which had been raised in argument, but directed a new trial; and the rule was accordingly made

Absolute.

(a) 10 Mod. 281.—(b) *Id.* 282.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN HILARY TERM,

IN THE FOURTH AND FIFTH YEARS OF THE REIGN OF GEO. IV.

MEMORANDA.

IN the course of the last vacation, the Right Honourable Sir *Robert Dallas*, Knight, resigned the office of Lord Chief Justice of this Court, and was succeeded by Sir *Robert Gifford*, Knight, his Majesty's Attorney-General; who was thereupon called to the degree of Serjeant at Law, and gave rings with the motto "*Secundis Laboribus.*" He took his seat on the Bench on the first day of this Term; and was shortly afterwards raised to the dignity of a Peer of the realm, by the style and title of Baron *Gifford*, of *St. Leonards*, in the county of *Devon*; and on the 3d of *February*, he took the oaths of allegiance and supremacy accordingly.

In the last Term, viz. on the 11th *November*, Sir *Richard Richards*, Knight, Lord Chief Baron of the Court of

Eschequer, died at his house in *Great Ormond Street*. He was succeeded by *William Alexander*, Esq. one of the Masters in Chancery, who was accordingly called to the degree of Serjeant at Law, and gave rings with the motto "*Secundis Laboribus*." He took his seat on the Bench on the first day of this Term, and shortly afterwards received the honour of Knighthood.

Sir *John Singleton Copley*, Knight, his Majesty's Solicitor General, was appointed to succeed Sir *Robert Gifford*, as his Majesty's Attorney-General. And

Charles Wetherell, of the Inner Temple, Esq. was appointed to the office of his Majesty's Solicitor-General.

The continued indisposition of Mr. Justice *Richardson*, prevented his returning to this country from *Malta*.

WOOLLEY, Plaintiff; HARRISON and Others, Deforciant.

MR. Serjeant *Pell*, moved to amend the writ of covenant, *præcipe*, and concord of this fine, by altering the Christian name of the wife of one of the deforciant, from *Maria* to *Mary Ann*. On his producing an affidavit, stating that the name of *Maria* had been inserted by the mere mistake of the attorney; and that she was an illiterate person, who could neither read nor write, and that the error had not been discovered until after the fine had passed; when, on examination of her baptismal certificate, her name was found to be inserted in the register as *Mary Ann*:—

The Court allowed the amendment.

had not been ascertained at the time the fine was levied.

1824

Friday,
Jan. 23d.

Where the wife of a deforciant was improperly described by the name of *Maria* instead of *Mary Ann*, the Court allowed the right name to be substituted in the writ of covenant, *præcipe*, and concord, on an affidavit stating that she was an illiterate woman, and that her real name

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Saturday,
Jan. 24th.

PYEBURN v. GIBSON.

Where the plaintiff recovered 5s. damages in an action of trespass *vi et armis* for taking his cart, and the Judge certified under the statute 43 *Eliz. c. 6*, the Court would not refer it to the Prothonotary to tax the plaintiff his costs, although the cause of action arose within the jurisdiction of an inferior Court empowered to hold pleas of any suit not exceeding 50s.

THIS was an action of trespass *vi et armis*, for seizing and taking the plaintiff's cart, of the value of 4l.—Plea, not guilty. The cause of action arose within the jurisdiction of the inferior court of *Yarum*, in the *North Riding* of the county of *York*, which was empowered to hold pleas of any suit not exceeding the amount of 50s.

At the trial before Mr. Justice *Holroyd*, at the last assizes at *York*, it appeared that after the process was served, but not before, the defendant offered to return the cart. The jury found a verdict for the plaintiff, damages 5s.; and the learned Judge certified under the statute 43 *Eliz. c. 6*.

Mr. Serjeant *Bosanquet* now moved that the Prothonotary might tax the plaintiff his costs, notwithstanding such certificate, and submitted that an action of trespass *vi et armis* could not be brought in a county court, or a court of inferior jurisdiction; and he referred to the case of *Lowe v. Lowe* (a), where this Court refused to stay proceedings in an action of trover, on an affidavit by the defendant, that the plaintiff's cause of action did not amount to 40s. So Lord *Coke*, in commenting on the statute of *Gloucester*, observed (b), that where a writ of trespass was *vi et armis*, and the king upon the conviction of the defendant should have a fine, the sheriff in his county could not hold plea of it. The first instance of a certificate having been granted under the statute of *Elizabeth*, appears to have been in the case of *White v. Smith* (c), which was an action for taking sand, and the decisions on the statute 22 & 23 *Car. 2. c. 9*, are inapplicable to the present case, as that statute has been holden to be confined to actions of assault, and for local trespasses.

(a) *Ante*, 220, *S. C.* 1 *Bing.* 270.—(b) 2 *Inst.* 311.—(c) 2 *Str.* 1232, n.

Lord Chief Justice GIFFORD.—Certificates have been frequently granted in cases of this description; since the case of *White v. Smith*, and I am therefore of opinion that there is no ground for thi application.

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v.
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Mr. Justice PARK.—In *Walker v. Robinson* (a), a certificate was granted in an action of trespass for an assault and taking a rope, where the jury gave 1s. 6d. damages; and it was there observed, that the statute 43 *Eliz.* took in all but a few excepted cases. It is extremely wholesome, that a certificate should be granted in a case of this description, and I accordingly certified on the last circuit in an action of a like nature.

Mr. Justice BURROUGH.—The object of the statute was to confine trifling suits to inferior courts, or, in other terms, to prevent the bringing of actions, which in point of principle ought not to be commenced at all.

Rule refused (b).

(a) 2 Str. 1232; S. C. 1 Wils. 93.—(b) In *Dand v. Sexton**, where the plaintiff recovered 1s. damages in an action of trespass *vi et armis*, for beating his dog, it was held that the Judge might certify under the statute of *Elizabeth* to prevent his recovering more costs than damages.

* 3 Term Rep. 37.

SELLS v. HOARE and Others (a).

Saturday,
Jan. 24th.

THIS was an action on the case for an excessive distress. In an action on the case for an excessive distress, it is not incumbent on the plaintiff to prove the precise amount of rent due, it being laid in the declaration under a *videlicet*;—and an arrangement between the parties respecting the sale of the goods seized, although after the distress, does not divest the tenant of his right of action.

(a) See the report of the proceedings that took place at *Nisi Prius* in this case, 1 Carr. N. P. C. 23. See also *ante*, Vol. VII. 36.

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The first count of the declaration stated, that the plaintiff, before the committing of the grievance thereafter mentioned, held and enjoyed a certain messuage and premises situate, &c. as tenant thereof to the defendants, under and by virtue of a certain demise before then made by them to him; and assigned for breach, that the defendants, not regarding the statute in such case made and provided, but contriving, &c. to harass and oppress the plaintiff, whilst he so held and enjoyed the premises as tenant thereof to the defendants, *to wit*, on, &c. wrongfully and injuriously seized, took, and distrained the plaintiff's goods then being on the premises, of the value of 300*l.*, and wrongfully sold and disposed of the same as and for a distress, by color of the statute, for certain rent, *to wit*, the sum of 95*l.*, then pretended by the defendants to be due to them for the demised premises; whereas in fact, at the time of making the distress and sale, the said rent was not in arrear or due to the defendants in respect of the aforesaid premises. The second count stated, that the defendants falsely pretending that 95*l.* was due from the plaintiff to them, as and for the rent of the premises, seized other goods of the plaintiff of the value of 300*l.*, as a distress for the sum so pretended to be due and in arrear as last aforesaid, and under that pretence also wrongfully and unjustly sold and disposed of the said last mentioned goods; whereas in fact, at the time of making the distress, a small part only, *to wit*, the sum of 1*l.* 3*s.* so pretended to be in arrear, was due from the plaintiff to the defendants for the rent of the premises. The third count stated, that a certain sum, *to wit*, the sum of 1*l.* 3*s.*, and no more, was due and in arrear from the plaintiff to the defendants; that they had taken and distrained certain goods of his, of much greater value than the amount of the said last mentioned arrears of rent; when, at the time of the taking of the distress, one hundredth part of the goods was of sufficient value to have satisfied the last mentioned arrears of rent, and costs and charges of the dis-

tres. The fourth count was in trover. The defendants pleaded — Not guilty.

At the trial of the cause, before Mr. Justice *Burrough*, at *Westminster*, at the Sittings after the last Term, the defendants claimed 95*l.* from the plaintiff for rent; and it was proved that on the broker's going to distrain for that sum, the plaintiff said that he had paid ground-rent to the amount of 12*l.* 10*s.*, so that 82*l.* 10*s.* only remained due to the defendants; that the broker then required the receipts for the ground-rent to be given to him, and said that those payments should be deducted from the rent; that the plaintiff refused to produce them, in consequence of which, the distress was made; that the broker merely took an inventory, and continued in possession at the request of the plaintiff, but that the goods were not sold or removed from the premises, and that the balance due from the plaintiff to the defendants for rent was afterwards adjusted. Under those circumstances, the jury found a verdict for the plaintiff, damages 1*s.*, and the learned Judge certified that they did not amount to 40*s.* in order to deprive him of his costs.

Mr. Serjeant *Vaughan* now applied for a rule nisi, that this verdict might be set aside, and a nonsuit entered, or a new trial granted; and submitted, that as the plaintiff's goods were not sold or removed from the premises, that the first and second counts of the declaration could not be supported, as they alleged a sale which had not been proved; and that the last, being founded in trover, could not be maintained in an action for an excessive distress; and consequently that the third count only, (if any), could at all meet the plaintiff's case. He submitted, *first*, that as the plaintiff had therein alleged that no more than 17*s.* was due from him to the defendants for rent, yet that it was a material allegation, although that sum was laid under a *videlicet*, and therefore that the plaintiff should

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have proved that such a sum only was due and in arrear from him to the defendants, or that at all events he should have shewn the amount of the rent actually due, which appeared to amount to 82*l.* 10*s.* *Secondly*, that this action could not be sustained, as the distress was never completed, as the property should either have been removed from the premises or sold, to satisfy the terms of the statute; instead of which, the distress was afterwards withdrawn on an arrangement being entered into between the parties.

Lord Chief Justice GIFFORD.—On the statement of the facts under which this action was brought, it is clear that it ought not to be encouraged, and the jury appear to have been of the same opinion by finding damages for the plaintiff to the amount of one shilling only. But the sole question now is, whether the action could be sustained on the evidence as given at the trial. It has been objected by my Brother *Vaughan*, in the first place, that there is a variance between the allegation contained in the third count of the declaration, and the proof given in its support. It was therein stated, that 1*l.* 3*s.* and no more was due from the plaintiff to the defendants, and that they had distrained for a much larger sum. It was not incumbent on the plaintiff to prove that the sum really due, was the precise amount as stated in the declaration. On his proving that a smaller sum was due than that for which the defendants distrained, it would have been sufficient to have enabled him to support the action. The defendants contended that 95*l.* was due, and evidence was given that that sum was distrained for. None, however, was adduced to shew, that 1*l.* 3*s.* only was in arrear, but it appeared that the plaintiff had paid ground-rents which reduced the rent actually due to the defendants to 82*l.* 10*s.* It does not appear to me to be incumbent on a tenant to produce receipts for the ground-rent paid by him; but if it were, it would have been a question for the jury, as well as whether the defendants, under the circumstances,

had acted vexatiously or not. On their own shewing, it appears that they distrained for 95*l.* when 82*l.* 10*s.* only was actually due. But no imputation whatever can be cast on them, although it has been suggested that their character will suffer, if this action can be supported. Another ground has been relied on, *viz.* that the subsequent arrangement between them and the plaintiff was an answer to the action, but I am of opinion that it was not. The action was founded on the defendants having distrained for more rent than was actually due to them from the plaintiff; that too was purely a question for the jury, unless the agreement exonerated the defendants altogether, so as to operate as an accord and satisfaction; for if the distress were excessive in the first instance, and the defendants had returned all its proceeds to the plaintiff, still, at common law, he would not be barred from his right of action. I fully approve of the certificate granted by the learned Judge at the trial, and think no sufficient ground has been stated to the Court for obtaining a rule for a nonsuit, or to induce them to grant a new trial.

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Mr. Justice PARK.—I am of the same opinion. It appears to me that there is no weight in either of the objections which has been now raised by my Brother *Vaughan*; and as both the points taken by him have been so fully gone into by my Lord Chief Justice, I need only observe that the character of the defendants can receive no injury whatever, and that appears to be manifest by the amount of the damages found by the jury.

Mr. Justice BURROUGH.—If it had been possible, I should have nonsuited the plaintiff at the trial, but the question depended on contradictory facts, and I am now clearly of opinion that there was no ground whatever for a nonsuit. The jury were of opinion that the action was vexatious and improperly brought, as they only found damages to the

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amount of one shilling. With respect to the objection which has been raised as to the form of the third count, there seems to me to be no question, as the sum stated to be in arrear was laid under a *videlicet*, and it was not incumbent on the plaintiff to have proved the precise sum due from him to the defendants for rent, but only that a smaller sum was due than that for which they distrained. On proof of the subsequent arrangement having been entered into between the parties, I was inclined to nonsuit the plaintiff; but the notice of distress was afterwards given in evidence, in which the defendants claimed 96*l.* for rent due to them, and under which the broker entered and took an inventory of the goods, and I think there need not be a sale to satisfy the terms of the statute. After the arrangement had been made, and the distress withdrawn, no man of honour or principle would have brought an action of this description. The character of the defendants, therefore, is by no means impeached; they are well known to be most respectable persons:—still, however, in point of law, the plaintiff has a right to sustain this action.

Rule refused (a).

(a) See *Willoughby v. Backhouse*, 2 Barn. & Cres. 821. S. C. 4 Dow. & Ry. 539.

Saturday,
Jan. 24th.

CORBOLD v. CASTON.

Where the master of a vessel entered into a parol agreement to carry the plaintiff's corn from A. to B., and that after having delivered it there, he would proceed to C. and fetch a cargo of coals, which he would bring back and deliver to the plaintiff at A. at a certain price *per chaldron*:—Held, that this was not a contract or agreement for the sale of goods, within the provisions of the statute 29 Car. 2, c. 3, s. 17.

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of a vessel, for not sailing from *Ipswich* to *Hull*, as soon as he ought to have done, and conveying the plaintiff's corn to the latter port, where having delivered it, he was to proceed to *Blyth* in *Northumberland*, and there procure and ship a cargo of *Cowper Main* coals, and deliver them to the plaintiff at *Ipswich*, at the rate of twenty-nine shillings *per* chaldron, to be paid for on delivery. The first six counts of the declaration were founded on the contract to carry the corn. The seventh stated, that the defendant undertook to carry the plaintiff's corn from *Ipswich* to *Hull*, and that after having delivered it there, he would proceed from thence to *Blyth*, from which port he would fetch a cargo of *Cowper Main* coals, and deliver them to the plaintiff at *Ipswich*, at the rate or price of twenty-nine shillings *per* chaldron; and assigned for breach, that although the plaintiff shipped the corn to be so conveyed by the defendant to *Hull*, yet that he did not proceed to *Blyth* and fetch therefrom a cargo of *Cowper Main* coals, and deliver the same to the plaintiff at *Ipswich*. The eighth count was nearly similar in terms to the seventh; and the ninth stated, that in consideration that the plaintiff, at the request of the defendant had bargained and agreed to buy of him a certain quantity of coals, which the defendant had undertaken to fetch from *Blyth* in a certain vessel of his, and deliver the same to the plaintiff at *Ipswich*, at twenty-nine shillings *per* chaldron, to be paid by the plaintiff to the defendant;—assigned for breach, that the defendant would neither fetch nor deliver them. To these were added the common money counts; and the defendant pleaded the general issue.

At the trial, before Mr. Justice *Burrough*, at *Guildhall*, at the sittings after the last Term, it appeared that the defendant, being master of a brig lying at *Ipswich*, verbally agreed with the plaintiff, that if he would ship forty quarters of corn on board the defendant's vessel, he would sail with it directly for *Hull*, and wait for no one; and that having delivered it there, he would proceed to *Blyth*, and fetch a

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cargo of *Cowper Main* coals, which he would bring back and deliver to the plaintiff at *Ipswich*, at the rate of twenty-nine shillings *per* chaldron. For the defendant, it was proved, that he was prevented from sailing with the corn immediately for *Hull*, or as soon as he otherwise might have done, by stress of weather. The plaintiff then rested his case on the seventh, eighth, and ninth counts of the declaration, as to the defendant's not proceeding to *Blyth*, and bringing back the coals: to which it was answered, that as there was no memorandum or agreement of the terms of the contract in writing it was void, as falling within the 17th section of the statute of frauds. It was then proved that the defendant said "he could take coals," and that he offered to bring them for the plaintiff from *Blyth* to *Ipswich*, at the rate of twenty-nine shillings *per* chaldron:—when it was again objected for the defendant, that this action could not be maintained; and the case of *Garbutt v. Watson* (a) was relied on, where a parol contract for the sale of a certain quantity of flour *to be prepared* and shipped within a given time, was held to fall within the provisions of the statute.

The learned Judge being of opinion that that case did not apply, as the flour was in the hands of the sellers at the time of the contract, whilst here, there was no actual contract for the sale of the coals, but merely an agreement for fetching and delivering them at a certain price, and the defendant himself was to procure or purchase them at *Blyth*:—the jury, under his direction, found a verdict for the plaintiff on the seventh, eighth, and ninth counts of the declaration; and it having been proved that he had been obliged to purchase other coals at a loss of 15*l.* in difference of price, the verdict was taken for that sum. Leave, however, was reserved to the defendant to move to set it aside, and that a nonsuit might be entered, in case

(a) 5 Barn. & Ald. 613; S. C. 1 Dow. & Ry. 219.

the Court should be of opinion that under the circumstances, the plaintiff was not entitled to recover.

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Mr. Serjeant *Pell* now moved accordingly, and contended, that as this was a contract by the defendant to deliver coals at a certain price, and no written agreement or memorandum had been entered into at the time, and as no part of the coals had been delivered, nor any earnest or part payment made, it fell expressly within the provisions of the statute. The agreement was substantially, and in effect, a contract for the sale of coals from the defendant to the plaintiff at a stipulated price, and to be paid for on delivery; and if the former had purchased the coals at *Blyth* and brought them to *Ipswich*, and the plaintiff had refused to pay for them, he would only have to prove the delivery and price agreed on, to render the plaintiff liable for their amount. This case therefore in principle, as well as circumstances, falls within that of *Garbutt v. Watson*, where the flour was not prepared at the time of the bargain, so as to be capable of being immediately delivered to the purchaser, and Mr. Justice *Bayley* there said (a), "this was substantially a contract for the sale of flour, and it seems to me immaterial, whether the flour was at the time ground or not." So, here, the contract was in substance for a sale of coals, and it matters not whether they were ready at the time, or at the pit's mouth; and although it may be said that this amounts to more than a mere contract for coals, as the fetching and delivery of them were engrafted on it, yet it would not take it out of the ordinary cases provided for by the statute; and if it were held otherwise, its effect might be evaded altogether. At all events, the ninth count of the declaration is so framed as to bring the case expressly within the meaning of the statute, as it is founded on an express contract of bargain and sale.

(a) 5 Barn & Ald. 615.

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Lord Chief Justice GIFFORD.—I am of opinion that this case does not fall within the scope or provisions of the statute. This was not a contract by the defendant to sell coals to the plaintiff, but to provide them for him at *Blyth*, and afterwards bring and deliver them to the plaintiff at *Ipswich*. If no coals could have been procured at *Blyth*, it is quite clear that the plaintiff could not have maintained an action against the defendant for goods bargained and sold, or for a breach of contract in not delivering them. The contract was founded on the purchase of coals at *Blyth* by the defendant himself, but there was none whatever, that he would sell them to the plaintiff; or, in other terms, the defendant contracted to fetch coals from *Blyth*, and afterwards carry them to *Ipswich*, and there deliver them to the plaintiff at a certain price. This therefore distinguishes this case from all those, where there has been a sale by the vendor himself. I therefore think, that the learned Judge was perfectly right in overruling the objection made at the trial, and consequently that this verdict ought not to be disturbed.

Mr. Justice PARK.—I am of the same opinion. This was not a contract for sale, nor did the defendant undertake to bring coals to the plaintiff at all events, but merely to procure or fetch them from *Blyth*. If on his arrival there, he discovered that none could be procured, no action could be maintained against him.

Mr. Justice BURROUGH.—The defendant was prevented from sailing from *Ipswich*, in the first instance, by tempestuous weather, and he only agreed, after the delivery of the corn at *Hull*, to proceed to *Blyth* and fetch coals from thence, to be delivered to the plaintiff at *Ipswich*. The coals were not the property of the defendant at the time the agreement was made. The contract therefore as far as regarded them was altogether executory. It was

not the intention of the defendant to make an express bargain, but merely to bring coals to the plaintiff at *Ipswich*, in case he could procure them at *Blyth*.

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Rule refused.

SPEACH v. SLADE.

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Jan. 24th.

MR. Serjeant *Bosanquet* moved to enter up satisfaction on the judgment roll in this cause, on an affidavit of the defendant's attorney, that the plaintiff, in 1802, obtained judgment against the defendant in an action of debt, for 400*l.*; and that, in 1805, the former had received 325*l.* 15*s.* from the latter in full satisfaction of his demand, and that the plaintiff had then accounted with the defendant's attorney for that sum. But it appearing that the plaintiff had died intestate three years since, and that no letters of administration had been taken out —

Where the plaintiff obtained judgment against the defendant in 1802, which was satisfied in 1805, and the plaintiff died intestate in 1821, the Court would not allow satisfaction to be entered on the roll on an affidavit of the defendant's attorney, that the plaintiff had received from the defendant a certain sum in full satisfaction of his demand, it appearing that administration had not been taken out to the plaintiff's effects.

The Court held, that as satisfaction had not been entered at the time the sum in question was received, it was necessary that general letters of administration should be obtained, before an application of this description could be made.

The learned Serjeant therefore took nothing by his motion.

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DILLAMORE v. CAPON.

The Court will not rescind or set aside a rule, on a suggestion, that at the time of discussion, the parties omitted to state the clause of a particular statute to counsel, which might have affected the judgment or decision of the Court;—as such clause should have been presented to their notice at the time the rule was discussed.

MR. Serjeant *Vaughan*, having, in the last Term, obtained a rule *nisi*, to enter a suggestion on the roll, in order to deprive the plaintiff of his costs, under the *Southwark* Court of Requests act, 22 *Geo.* 2, c. 47, s. 6, and which the Court after argument and deliberation discharged, on the ground that both the plaintiff and defendant should have been *resiant* within the jurisdiction of that Court (*a*): the learned Serjeant on the first day of the present Term, applied to have that rule rescinded or discharged, on the ground that the statute 32 *Geo.* 2, c. 6, which was intitled an act to explain and amend the 22 *Geo.* 2, c. 47, and was passed for the purpose of extending the powers and provisions of that act, to such part of the eastern half of the hundred of *Brixton*, as was not included in that act;—and which had not been cited or referred to in the argument, or adverted to by the Court in delivering their judgment, was express to shew that a defendant was entitled to a suggestion to deprive the plaintiff of his costs, although the latter might not reside within the jurisdiction of that Court (*b*).—Besides, the 32 *Geo.* 2, c. 6, not only expressly refers to and recites the 22 *Geo.* 2, c. 47, but the provisions of that statute are re-

(*a*) See *ante*, 429.

(*b*) The 32 *Geo.* 2, c. 6, after reciting the 22 *Geo.* 2, c. 47, and “that it had been found by experience that the execution thereof had been of great benefit and advantage to the several tradesmen, artificers, manufactors, and other persons living within the said town and borough, and the several parishes, precincts and liberties mentioned in the said act, but that some doubts having arisen whether any person or persons inhabiting within the said limits, and indebted to persons who did not live within the same, were subject to the jurisdiction of the said Court: and that it would be of great advantage to the several tradesmen, artificers, manufactors, and other persons living and residing within the several parishes of *Streatham*, *Clapham*, and *Camberwell*, and the ma-

enacted by the 2d section of the 32 Geo. 2 (a). The late statute 4 Geo. 4, c. 123, cannot operate in the present case,

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nor of *Hatcham*, in the parish of *St. Paul, Deptford*, in the county of *Surrey*, being the remaining part of the eastern half of the hundred of *Brixton*, which was not included in the said act, if the said act were extended to the said parishes and manor: It was enacted by the 1st section, "that from and after the 5th day of *April*, 1759, all persons whatsoever, inhabiting within the limits of the jurisdiction of the said Court of Requests, should be, and were thereby declared to be subject to the process and jurisdiction of the said Court, constituted by the 22 Geo. 2, c. 47, for any debt or debts by them or any of them, then, or at any time or times thereafter, owing to any person or persons, bodies politic or corporate, not exceeding the sum of forty shillings, *although the plaintiff* or plaintiffs suing out such process *should not* inhabit or reside within the said borough of *Southwark*, or any of the parishes mentioned in the said recited act, or the liberties or precincts thereof;—any thing in the said former act contained to the contrary notwithstanding."

(a) By which it was enacted, "that from and after the said 5th day of *April*, 1759, the said act made in the 22 Geo. 2, intituled an act for the more easy and speedy recovery of small debts within the town and borough of *Southwark*, and the several parishes of *St. Saviour; St. Mary, at Newington; St. Mary Magdalen, Bermondsey; Christ Church; St. Mary, Lambeth; and St. Mary at Rotherhithe*, in the county of *Surrey*, and the several precincts and liberties of the same, with the explanation and amendment thereof, therein before enacted, and all the powers, directions, punishments, penalties, forfeitures, provisions, matters, and things in the said act contained, should extend, and were thereby extended to, and should take effect, operate, and be executed, with respect to the several parishes of *Streatham, Clapham, and Camberwell*, and the manor of *Hatcham*, in the parish of *St. Paul, Deptford*, in the county of *Surrey*, being the remaining part of the eastern half of the hundred of *Brixton*, which was not included in the said act, and to all the residents, inhabitants, and persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood within the said parishes and manor, and to all other persons, in such and the same manner, and as fully and effectually to all intents and purposes whatsoever, as if the said parishes and manor were part of the said town or borough of *Southwark*, or as if the said powers, directions, punishments, penalties, forfeitures, provisions, matters, and things, were *there* in re-enacted with respect and in relation to the said parishes and manor."

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as it was passed since the cause of action arose. As, therefore, by the statute 32 *Geo. 2*, c. 6, it is sufficient if the debtor alone live within the jurisdiction of the *Southwark* Court of Requests; the defendant is at all events entitled to have execution suspended, which will be otherwise issued against him; and more particularly so, as the statute 32 *Geo. 2*, was not presented to the notice of the Court, before or at the time of their coming to the conclusion they did.

Lord Chief Justice GIFFORD.—The effect of this motion is to open and re-discuss a judgment which was pronounced by the Court in the last Term. The ground of the original application depended entirely on the construction of the *Southwark* Court of Requests acts. That motion appears to have been deliberately discussed; and the Court, after having taken time for consideration, pronounced its decision. There would be no end of discussion, if a rule could be again opened after the Court has expressly decided upon it; and speaking for *myself*, I should not be inclined to open a rule, although the Court might have erred in its judgment, for it cannot be always infallible. Besides, the 46 *Geo. 3*, expressly refers to the 32 *Geo. 2*, and it must therefore be assumed, that that statute came under the consideration of the Court. If not, the parties must now abide by the consequences, and suffer from their own negligence in not having fully instructed counsel, when the application on the part of the defendant was first made.

Mr. Justice PARK.—I am of the same opinion. It would be highly dangerous if an application of this description were allowed. The cause was originally tried before me after the last *Easter* Term, and if the defendant had then applied for a certificate I should have granted it; instead of which, he came to the Court by motion in the last Term, to deprive the plaintiff of his costs, under the

statute 22 *Gen.* 2, c. 47, and even after that motion had been discussed, and the Court had decided against him, he applied for a certificate, which was of course refused, he having previously made his election. The Court, after argument, fully considered the case, and I believe all the clauses of the different statutes, with reference to the point in question, were carefully looked into and examined, and the judgment was pronounced on a point which had been but slightly touched on in the course of the argument, *viz.* that under the provisions of the *Southwark* Court of Requests acts, both the plaintiff and defendant must be resident within the jurisdiction of that Court; and although the late Lord Chief Justice was not present at the time of the discussion, he expressed his concurrence in the opinion to which we ultimately came. It is at all events an equitable construction, that both parties should reside within the jurisdiction of an inferior Court, if it be not negatived by statute. If parties do not fully instruct counsel as they ought, can it be endured, that after the Court has exercised an honest discretion, it must be called on again to overturn its own decision? If there has been any oversight, this case may be canvassed, and the propriety of our decision doubted, when a similar question may next arise. The negligence in not sufficiently instructing counsel is clearly attributable to the parties themselves.

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Mr Justice BURROUGH concurred.

Rule refused (a).

Mr. Justice PARK addressing himself to Mr. Serjeant *Vaughan*, on this day observed, that since he had made the

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(a) See *Brooks v. Weston*, *ante*, 87, where the Court ordered a rule, providently drawn up through the mistake of the officer, to be discharged on terms.

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above motion, he had carefully examined all the statutes affecting the case, and more particularly so, that which had been stated to have been overlooked by the Court in the last Term. That if their attention had been then drawn to that act, it would not have altered or affected their decision, as the whole object of that, as well as the later acts, was to extend the jurisdiction of the *Southwark* Court from time to time, and consequently that he considered that the view the Court originally took of this question was correct.

Tuesday,
Jan. 27th.

HARTLEY v. STEAD and HAWKESWORTH.

Where the sheriff, under a writ of *fi. fa.*, levied and sold a vessel, the joint property of two defendants, and after satisfying the plaintiff his demand and expences of the levy, a surplus remained in his hands, and the defendants disputing their interests in the vessel, the sheriff refused to pay over such surplus, unless the one to whom it was paid would indemnify him against the claims of the other, which they both

THE plaintiff having sued out a writ of *fi. facias* against the defendants in this cause, directed to the sheriff of the county of *Lincoln*, indorsed to levy 148*l.*, and under which he had seized a vessel, the joint property of the defendants, and sold it for 405*l.*, the surplus of which, after satisfying the plaintiff his demand and the expences of the levy, still remained in his hands; and there being a dispute between the defendants as to the amount of their respective shares in the vessel, the sheriff, on being applied to by them for the balance then remaining in his hands, offered to pay it over to either of the defendants who would indemnify him against the claims of the other; but which they both refused to do.

Mr. Serjeant *Cross* now applied for a rule *nisi*, on behalf of the sheriff, that he might be at liberty to pay the surplus into Court, to be paid over to the party applying to take it out, on his giving such an indemnity as the Prothonotary might require.

refused to do; the Court would not interfere, nor allow the sheriff to pay the money into Court, to remain there, until an indemnity was given to the satisfaction of the Prothonotary.

But the Court observed, that there was no precedent for such an application. That as the sheriff had levied, and sold the joint property of the defendants, and satisfied the plaintiff's demand thereout, as well as the expences attending the levy, it was his duty to return the surplus to the defendants. That if the sheriff experienced any difficulty, it was incident to the execution of his office as such. That if each of the defendants brought an action against him for the balance remaining in his hands, he might file a bill of interpleader; but that, as he had done all the Court required of him, and satisfied the terms imposed on him as to the execution of the writ, they could not now interfere.

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The learned Serjeant therefore took nothing by his motion.

EDWARDS v. BELL and Others.

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THIS was an action brought by the plaintiff as pastor or minister of a dissenting chapel, at *Great Marlow*, against

Where the plaintiff, a dissenting minister, charged the proprietors of

a newspaper, with publishing therein the following libel against him, viz. "A serious misunderstanding has recently taken place amongst the Independent Dissenters of *Great Marlow* and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter against a young lady of distinguished merit, and spotless reputation. We understand, however, that the matter is to be taken up seriously:"—and the defendants, in justification, pleaded that the plaintiff, just before his preaching and delivering a certain discourse or sermon addressed by him as such pastor or minister to a certain congregation of dissenters in a certain chapel, and that whilst he was officiating in the said chapel as pastor or minister spoke and published from a certain part or station of the said chapel, assigned to him as pastor and minister for the preaching and delivery of the discourse or sermon, to and in the presence of the congregation, of and concerning one *M. F.*, these scandalous words following: "I have something to say, which I have thought of saying for some time, namely the improper conduct of one of the female teachers, her name is *Miss F.* her conduct is a bad example and disgrace to the school, and if any of the children dare ask her to go home, she shall be turned out of the school and never enter it again; *Miss F.* does more harm than good:"—and thereby gave great offence to divers of the dissenters, to wit, one *A. B.*, one *C. D.*, and one *E. F.* and occasioned a serious misunderstanding amongst the dissenters in the declaration mentioned. The jury having found a verdict for the defendants on this plea:—Held, on a motion in arrest of judgment, that it was a sufficient answer to the libel as charged in the declaration.

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the defendants, as printer and proprietors of *The Times* newspaper. The declaration contained four counts; the first of which stated, that the plaintiff, before and at the time of committing the several grievances by the defendants as thereafter mentioned, was, and from thence hitherto hath been, and still is, pastor and minister of certain dissenters from the Church of *England* as by law established, at *Great Marlow*, in the county of *Bucks*, and as such pastor or minister had always behaved and conducted himself, and until the time of committing the several grievances by the defendants, was deemed and reputed to behave and conduct himself well, decorously, and properly, and had never been guilty or suspected to have been guilty of the misconduct thereafter mentioned to have been charged and imputed to him by the defendants, or any such misconduct whatever, nor had any misunderstanding then recently taken place between the said dissenters and the plaintiff:—By means of which said several premises, the plaintiff had, as such pastor or minister, deservedly obtained the good opinion, respect, and confidence of the said dissenters, and other good and worthy subjects of this realm, to whom he was in any wise known:—Yet, that the defendants well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending to injure him as such pastor or minister, and to bring him into public scandal, infamy, and disgrace, with and among the said dissenters and other good and worthy subjects of this realm, to whom he was in any wise known, and to cause it to be suspected and believed, that the plaintiff, in abuse of his office, and in derogation of his character in respect thereof, had indecorously and improperly uttered personal invectives from his pulpit, and that thereby discord and ill-will had arisen, and then subsisted between the said dissenters and the plaintiff, and also to induce and cause the said dissenters and other subjects to

withdraw from him their good opinion,^d respect, and confidence, and to stir up and promote discord and ill-will among the said dissenters in regard to the plaintiff, and thereby and otherwise to vex, harass, and oppress him, as such pastor or minister as aforesaid, heretofore, *to wit*, on the 28th April, 1823, falsely, wickedly, and maliciously, did print and publish, and cause and procure to be printed and published, in a certain public newspaper, called "*The Times*," of and concerning him the plaintiff as such pastor or minister as aforesaid, a certain false, scandalous, and defamatory libel, to the tenor and effect following, that is to say, "A serious misunderstanding has recently taken place amongst the Independent Dissenters of *Great Marlow* (meaning the said dissenters), and their pastor (meaning the plaintiff), in consequence of some personal invectives publicly thrown from the pulpit by the latter (again meaning the plaintiff), against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously. *Bucks Chronicle*." The three remaining counts set out the libel in part and in whole, and with different innuendoes.

The defendants pleaded, *first*, Not guilty. *Secondly*, that before and at the time of the speaking and publishing the several scandalous words by the plaintiff as thereinafter mentioned, one *Margaret Fair* did assist in the management and conduct of a certain Sunday School, and was a person of distinguished merit and spotless reputation; that the plaintiff well knowing the premises, before the several times of printing and publishing, and of causing to be printed and published the several supposed libels by the defendants, as in the declaration mentioned, to wit, on the 6th April, 1823, at *Great Marlow* aforesaid, just before his preaching and delivering a certain discourse or sermon, then and there by him as such pastor or minister, as in the declaration mentioned, address-

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ed and preached to a certain congregation of the said dissenters then and there assembled, for the purpose of, (amongst other things), hearing the said discourse or sermon, in a certain chapel, and whilst he the plaintiff was officiating in the said chapel as such pastor or minister as aforesaid, spoke and published from a certain part or station in the said chapel, then and there assigned to him as such pastor or minister, for the aforesaid preaching and delivery of the said discourse or sermon, and to and in the presence of the said congregation, of and concerning the said *Margaret Fair*, these scandalous words following, that is to say,—“I (meaning himself the plaintiff) have something to say, which I (again meaning himself the plaintiff,) have thought of mentioning for some time, *namely*, the improper conduct of one of the female teachers, her name is *Miss Fair*, (meaning the said *Margaret Fair*), her (meaning the said *Margaret Fair's*), conduct is a bad example and a disgrace to the school, (meaning the said school), and if any of the children dare ask her to go home, she shall be turned out of the school, (meaning the said school), and never enter it again. *Miss Fair* (meaning the said *Margaret Fair*), does more harm than good :”—and thereby then and there gave great offence to divers of the said dissenters, *to wit*, one *Joseph Wright* the elder, one *Joseph Wright* the younger, one *Samuel Washbourn*, one *William Wright*, one *Sarah Puddifant*, and one *Ann Jaques*, and occasioned a serious misunderstanding amongst the said dissenters in the declaration mentioned;—Wherefore the defendants did afterwards, *to wit*, at the said several times when, &c. in the declaration mentioned, print and publish the supposed libels in the declaration mentioned, as they lawfully might for the cause aforesaid, which are the same printing and publishing the supposed libels in the declaration mentioned, and this they are ready to verify, &c.—There were two other pleas which were similar

in substance.—The plaintiff added a *similiter* to the plea of not guilty, and, as to the three others, replied *de injuriâ*; on which issue was joined.

At the trial, before Mr. Justice *Burrough*, at *Guildhall*, at the sittings after the last *Trinity* Term, several witnesses were called, who proved that the plaintiff had spoken the words of and concerning Miss *Fair*, as stated by the defendants in their second plea. The jury accordingly found a verdict for the plaintiff on the general issue, damages 40*s.* and for the defendants on the three special pleas.

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Mr. Serjeant *Pell*, in the course of the last Term, obtained a rule, calling on the defendants to shew cause, why judgment should not be entered up for the plaintiff, notwithstanding the verdict found for them on the special pleas at the trial. He founded his motion on two grounds, *first*, that the words in the justification "from a certain part or station in the chapel assigned to the plaintiff as pastor, for the preaching and delivery of the discourse or sermon," did not sufficiently designate the "pulpit," from which it was stated in the libel that the words were delivered. And *secondly*, that the words contained in the justification, even if proved, did not furnish a sufficient defence to the action, or answer the plaintiff's charge as laid in the declaration, as the libel imported one thing, and the justification another.

The Court were clearly of opinion that the terms adopted in the second plea, *viz.* that the words were spoken by the plaintiff from a certain part or station in the chapel assigned to him as pastor, for the preaching and delivery of the discourse or sermon, were sufficient to designate the pulpit, or were equivalent to it, although that word was not used. If the plea had stated that the plaintiff had delivered an oration from the usual place of discourse as-

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signed to him in the chapel, the pulpit, although not expressly named, would naturally be inferred.

The rule therefore was granted on the second point only, viz. as to whether the special pleas afforded a sufficient answer to the libel, as set forth by the plaintiff in his declaration.

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Taddy*, now shewed cause. The second plea constitutes a sufficient answer to the action, and supports in substance all the matter contained in the alleged libel, as set forth or charged in the declaration. The defendants have not only justified according to the truth, but to the full extent of the libel; for the words used by the plaintiff respecting Miss *Fair*, and stating that her conduct was a bad example and disgrace to the school, amounted to a personal invective, and unwarrantable aspersion of her character. The defendants could not have affirmed the libel in general terms, and were therefore bound to plead the particular act on which they founded their justification, according to the case of *J'Anson v. Stuart* (a). So, in *Holmes v. Cutesby* (b), where a libel charged an attorney with general misconduct, a plea of justification, repeating the same general charges, without specifying the particular acts of misconduct, was held to be insufficient. The second plea therefore is not only properly framed, but is a complete answer to the charge set forth in the declaration, and must at all events be taken to be good after verdict. In order to have entitled the plaintiff to recover, he should have shewn that the defendants' publication contained a wilful misrepresentation of the expressions used by him with regard to Miss *Fair*, or that they were published with a malicious intent; and although the import be not expressly the same, yet if there be no

(a) 1 Term Rep. 748.—(b) 1 Taunt. 543.

apparent and wilful misrepresentation, the action cannot be maintained. This case is distinguishable from that of *Lewis v. Clement* (a), where the defendant pleaded that the supposed libel contained a true account of proceedings in a Court of law, yet, as the libel was headed with the words "shameful conduct of an attorney," which formed no part of the proceedings in such Court, the plea was held bad, although the account of the proceedings were true. Here, however, the publication in question merely charges the plaintiff with the fact of having employed personal invectives. That must mean invectives directed or pointed to some given individual. It was not necessary for the defendants to justify with strictness as to the express words of the libel, it was sufficient for them if the words set out in their plea supported the substance of the charge, according to the case of *Woolnoth v. Meadows* (b); and here the words spoken by the plaintiff must, in their general acceptance, be taken to amount to a personal invective, or allusion to some particular person.

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Mr. Serjeant *Pell*, and Mr. Serjeant *Peake*, in support of the rule, insisted that neither of the defendants' pleas was an answer to the plaintiff's charge as laid in the declaration, although the words contained and set out in such pleas might have been spoken by him, as they differed from the libel or publication in question in the following material respects: *First*, it must be inferred from the terms of the libel, that a serious misunderstanding had taken place amongst the Independent Dissenters of *Great Marlow* and their pastor; whereas, by the plea, it is alleged that a serious misunderstanding had been occasioned amongst the dissenters only, and not between them and their pastor. *Secondly*, the libel concludes by stating that "the matter was to be taken up seriously." That must apply to the

(a) 3 Barn. & Ald. 702.—(b) 5 East, 463.

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personal invectives before alluded to, and as tending to criminate a young lady of spotless reputation, which had produced the misunderstanding between the pastor and his flock. The plea takes no notice of the words "we understand that the matter is to be taken up seriously," nor does it attempt to justify them in any terms whatever, and this is the very sting and essence of the libel. It is at all events a gratuitous comment by the editor; and if so, it brings this case expressly within that of *Lewis v. Clement*, as the defendants had taken upon themselves to allege that which they could neither know, nor be warranted in asserting. *Thirdly*, a minister may give offence, without occasioning the existence of a serious misunderstanding between himself and his congregation. The language used by the plaintiff was not an attack on the moral character of Miss Fair, or intended as a personal invective, it merely complained of her want of discipline, or a breach of the regulations of the school of which she was one of the teachers; as he said, that "if any of the children dared ask her to go home, she should be turned out of the school." It does not follow that those words would create a serious misunderstanding between the plaintiff and his congregation, or that he was so much to be blamed as to cause a serious misunderstanding to exist between him and the Independent Dissenters of *Great Marlow*. Those who did not hear them, might at all events be inferred to be no parties to such misunderstanding. The pleas therefore do not answer the whole of the libel, and in *Woolnoth v. Meadows*, the only question was, as to the sense and effect to be given to the particular words spoken as set out in the declaration, and not on the precision required in a plea of justification; and that case only determined that slanderous words must be understood by the Court in the same sense as they would be ordinarily understood by mankind in general; and here, from the terms of the libel, it must be inferred that the pastor, whilst he was preaching, took the opportunity of

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venting his spleen or malice against a lady, by personal invective, and thereby not only gave offence to the whole of the dissenters residing in the parish where the words were spoken, but that it was in the contemplation of the lady or her friends to recover a compensation, either by an action at law, or criminal information, as it was stated to be understood that the matter was to be taken up seriously. No such charge can be justified; nor have the defendants attempted to shew, that they had been informed that the matter was to be so taken up. *Lastly*, it must be assumed, from the terms of the libel, that the invectives were thrown out from the pulpit in the course of the sermon; whereas, according to the plea, the words were spoken just before the preaching or delivery thereof. There might have been a previous conversation between the plaintiff and his congregation, as to Miss *Fair's* misconduct in the management of the school, which would not amount to a personal invective; or, at all events, not to so great a degree as to be productive of a schism between the plaintiff and those of the protestant dissenters in the parish where they were spoken; and more particularly so, as it is expressed in the plea that it only gave offence to six persons therein named. The justification therefore only goes to part of the charge as alleged in the declaration, and is consequently not a sufficient answer to the action.

Lord Chief Justice GIFFORD.—This was a motion to enter up a verdict for the plaintiff in an action for a libel, notwithstanding a verdict found for the defendants on several special pleas justifying the libel. The plaintiff has stated himself in his declaration to be the pastor or minister of certain dissenters at *Great Marlow*, and that as such he had always conducted himself well, decorously, and properly. [Here his Lordship read the first count of the declaration, and the libel as therein set forth]. It appears that the gist and sting of the charge contained in these words, is in representing the plaintiff to have poured forth scandal and

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invective from the place in which it was his duty to have preached or published religious instruction to his congregation, for the purpose of calumniating a young lady of spotless reputation, and which had occasioned a serious misunderstanding between himself and the dissenters of the parish in which he lived, and that the matter was to be taken up seriously. This certainly amounts to a grave and serious charge; but the defendants have put three several special pleas of justification on the record, and it is sufficient to refer to the first only. [Here his Lordship read that plea.] Several objections have been raised to this plea, the last of which is, that the charge in the libel, as set out in the declaration, imports that the plaintiff uttered invectives from the pulpit in the course of his sermon. I do not understand the libel to convey any such meaning, and although the fact might have been so, it does not appear to me that it would make any material difference. The charge is, that the plaintiff threw out personal invectives from the pulpit; and the plea states that the words were spoken just before the preaching of the sermon, from a part of the chapel assigned to him for the preaching of such sermon. That therefore is a direct answer to that part of the charge. Has then the plaintiff uttered personal invectives? If I understand what is meant by personal invective, he could scarcely have conveyed stronger terms, or expressed himself in more forcible language. He not only stated that *Miss Fair's* conduct was a bad example, and that if any of the children dared ask her to go home, she should be turned out of the school, and never enter it again, but that she (*Miss Fair*) was a disgrace to the school; and not content with that, he went on to say that "she did more harm than good." These expressions clearly constitute personal invective, and must be taken to refer to her general conduct, not only as far as regarded her in the character of a teacher at the school, but they were even calculated to raise an impres-

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sion, that they were intended to apply to her moral character. This part of the charge is also substantially answered by the plea. The libel with which the defendants are charged is, that, in consequence of those invectives, a misunderstanding had taken place amongst the dissenters and their pastor, and that "it was understood that the matter was to be taken up seriously." But the gist of the libel, is the charging the plaintiff with having uttered personal invectives against a young lady from his pulpit in his character of pastor. It has also been objected that the libel set forth that a serious misunderstanding had taken place amongst the dissenters and their pastor, whilst the plea merely alleges that the words spoken gave great offence to divers, viz. to six only of the dissenters therein named; but it proceeded to state that it occasioned a serious misunderstanding amongst the dissenters in the declaration mentioned. The plea therefore substantially justifies that part of the charge as contained in the libel. It has further been urged that the allegation at the conclusion of the libel, "we understand, however, that the matter is to be taken up seriously," implies that charges were to be preferred against the plaintiff either by his congregation or Miss *Fair*; and that she was either about to commence an action, or file a criminal information against him; and that the justification affords no answer to this part of the charge. I do not see that the allegation necessarily conveys any such meaning. It would be too much to say, that it would be libellous to state, that something had been said by a minister in the course of his officiating as such, which was to be taken up seriously by his congregation, when the charge on such a subject has been substantially met and answered. On the whole, therefore, I am of opinion, that the second plea furnishes a sufficient answer to the charges as laid by the plaintiff in his declaration, and consequently that this verdict ought not to be disturbed.

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Mr. Justice PARK.—The charge complained of on the face of the declaration is of a general nature, viz. that the plaintiff had pronounced or uttered personal invectives from the pulpit, against a young lady of spotless reputation. And it would have been no answer to it, if the defendants had merely reaffirmed this in their plea.—They were, therefore, obliged to go more minutely into particulars, and they accordingly averred that the plaintiff just before his preaching and delivering a certain discourse or sermon by him as pastor or minister, and whilst he was officiating in the chapel as such pastor or minister, spoke and published, from a certain part or station of the said chapel assigned to him as pastor or minister for the preaching and delivering of the discourse or sermon, and to and in the presence of the congregation, of and concerning one *Margaret Fair*, one of the female teachers of the school, the scandalous words set out in the sequel of the plea. He not only referred to her by name, and described her as one of the teachers, but said that her conduct was a disgrace to the school. Without going further, this appears to me not only to be a personal invective, but a slanderous aspersion of the character of a young lady. It has been said, however, that it is stated in the libel that it caused a serious misunderstanding between the dissenters and their pastor, and that the plea merely alleges that the misunderstanding existed amongst some of the congregation only, and not as between the body of dissenters and their pastor. But that was not the gist of the libel, and even if it had been, the pastor himself might most properly be termed a dissenter; and if he had any misunderstanding with his congregation or part of them, it would amount to a misunderstanding among the dissenters. As to the statement that “the matter was to be taken up seriously,” although it forms the concluding part of the libel complained of, still it cannot be considered as a libel in itself, nor so connect-

ed with it as to be termed libellous. I am therefore of opinion that this rule ought to be discharged.

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Mr. Justice BURROUGH.—When this cause came on before me for trial, at *Guildhall*, I had no doubt but that the publication in question was a libel, and I also thought that the defendant's pleas of justification contained a full and sufficient answer to the whole of it. I so stated it to the jury, and they found their verdict accordingly. It is the duty of a pastor or minister to preach against vice and immorality, but not to use the pulpit or place devoted to moral instruction, for the purpose of expressing invectives against individuals: and here there can be no doubt, but that the imputation cast on Miss *Fair* was improper and highly reprehensible. Such conduct ought not to be endured. The defendants, then, were entitled to justify, by shewing that what they had alleged against the plaintiff as to such invectives was borne out by fact. Is then the second plea as proved, an answer to the libel? It is sufficient if the substance of the libellous statement has been answered or can be justified; and it is unnecessary to repeat every word of the libel complained of, or which might have given rise to the original comment; and I am clearly of opinion that the substance of this charge has been fully and satisfactorily answered; and that the defendants have justified so much of it as takes away the sting of the charge therein contained. Every matter extraneous to it need not be justified; and as it appears to me that the defendants have in effect most fully justified all the libellous matter with which they have been charged, I fully concur with the Court in thinking that this rule must be

Discharged (a).

(a) The plaintiff had commenced a similar action against the printer and publisher of the *Bucks Chronicle*, which he afterwards abandoned.

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IN THE EXCHEQUER CHAMBER.

Thursday,
Jan. 29th.

WATKINS, GENT. one, &c. v. FLANNAGAN, Esq.

In Error (a).

A surety under an annuity deed, who had redeemed the annuity subsequently to the bankruptcy and certificate of the grantor, may maintain an action of debt against him on an indemnity bond, for the sum paid by such surety for the value of the annuity on its redemption, although the grantee had proved for the arrears and value of the annuity, under the statute 49 Geo. 5, c. 121, s. 17;—on the ground, that such surety was not entitled to come in and prove the value of the annuity as a debt under the commission, by virtue of the 8th section of that statute.

THIS was an action of debt on an annuity bond, and brought by the plaintiff below, (defendant in error), as surety for the defendant below, (plaintiff in error), for the payment of an annuity granted by deed, to recover from the latter as the principal, after his bankruptcy and certificate, the amount of certain sums paid by the plaintiff below as such surety to the grantee of the annuity, in discharge of the arrears which became due after the bankruptcy, and for the redemption of the annuity. The declaration set out the bond, dated the 5th *March*, 1811, for the payment of 4200*l.*, in which was recited an indenture of the same date; and by which the defendant below granted an annuity of 300*l. per annum* to one *James Martin*, for the life of the defendant below; and the defendant below covenanted to pay the same accordingly, and repay and reimburse *Martin* all such extra premium for insurance as he (*Martin*) should pay, by reason of the defendant's below going into parts beyond the seas, and all loss, costs, charges, damages, and expenses which *Martin* should suffer by reason thereof:—And the plaintiff below also covenanted with *Martin*, in and by the said indenture, that in case the defendant below did not pay the said annuity of 300*l.*, and such extra premium for insurance, together with all loss, costs, &c. as aforesaid, he (the plaintiff below)

(a) See 3 Barn. & Ald. 186.

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would. A warrant of attorney was also recited in the bond, of the same date with the indenture, from the defendant and plaintiff below, to confess a judgment for 4200*l.* at the suit of *Martin*, for the better securing the payment of the said annuity, extra premium, loss, costs, &c. to him. The bond further recited, that the plaintiff below, having, at the particular instance and request of the defendant below, joined in and executed the indenture, and warrant of attorney, for the purpose of furthering the interest of the defendant below; it was agreed between them, that the defendant below should execute the bond, for the purpose of indemnifying the plaintiff below from the payment of the said annuity, and also from the payment of any extra premium, loss, costs, &c. covenants, conditions, and agreements, in the indenture and warrant of attorney respectively contained:—The condition of the bond was, that “if the defendant below, his heirs, executors, or administrators, did and should, from time to time, and at all times thereafter, well and sufficiently save, defend, keep harmless and indemnified the plaintiff below, his heirs, executors, or administrators, and his and their lands, tenements, goods, and chattels respectively, of, from and against the payment of the said annuity or yearly sum of 300*l.*, and every or any part or parts thereof, and of and from the payment of such extra premium for insurance, loss, costs, charges, damages, and expenses, as aforesaid; and also of and from the covenants, conditions, provisoes, declarations, and agreements in the said in part recited indenture and warrant of attorney respectively contained; and of and from the payment of all sums of money thereafter to grow due thereon, or become payable in respect or by virtue thereof; and of, from, and against all and all manner of action and actions, suit and suits, loss, costs, charges, damages, and expenses whatsoever, which should or might be brought, carried on or prosecuted against, or that he, (the plaintiff below), his heirs, executors, or admi-

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nistrators, or any or either of them should or might at any time or times thereafter bear, pay, sustain, or be put unto, for or by reason or means of the non-payment of the said annuity or yearly sum of 300*l.*, or any part thereof; and also by the non-payment of such extra premium for insurance, loss, costs, charges, damages, and expenses, or any part or parts thereof, or for or by reason or means of the plaintiff below having executed the said thereinbefore in part recited indenture and warrant of attorney respectively, or in any wise howsoever relating thereto; then the bond should be void, otherwise to remain in full force and efficacy."—The declaration then went on to aver, that it was by the said indenture in part recited in the bond, stipulated and provided, and that *Martin*, for himself, his heirs, executors, and administrators, covenanted and agreed with the defendant and plaintiff below, and each of them, and the executors and administrators of the plaintiff below, that in case the defendant and plaintiff below, or either of them, or the heirs, executors, or administrators of the plaintiff below, should at any time thereafter be minded, or desirous of re-purchasing the said annuity, and should give notice of such their intention to *Martin* in writing by the space of seven days; then, that he, (*Martin*), should, on the expiration of such notice, and on payment of all such sums as should be then due for the arrears of the said annuity, and all such extra premium for insurance, loss, costs, &c. &c. as should have been paid or sustained by *Martin*, he (*Martin*) would accept and take the sum of 2175*l.* as and in full for the re-purchase of the said annuity; and on the receipt of that sum, and all arrears, &c. &c., he would cause satisfaction to be acknowledged on the record of the judgment that should be entered on the authority of the warrant of attorney, and discharge the register of the memorial of the indenture and warrant of attorney.

The plaintiff below then assigned for breaches of the condition of the bond:—*First*, that after the making thereof, to

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wit, on the 5th *March*, 1813, the sum of 300*l.* of the said annuity, for one year ending on that day, became due and payable to *Martin* by virtue of the said indenture; yet that the defendant below did not nor would save harmless, and indemnify the plaintiff below from the payment of that sum; by means whereof, he was afterwards forced and obliged to, and did necessarily pay the same to *Martin*, as and for the arrears of the said annuity. *Secondly*, that after the said 5th of *March*, in the first breach mentioned, *to wit*, on the 5th *June*, 1817, the sum of 1275*l.* for four years and a quarter, which expired on that day, became and was due and payable to *Martin*, in respect and by virtue of the said indenture; yet that the defendant below would not save harmless and indemnify the plaintiff below from the payment of that sum; by means whereof, he was afterwards forced and obliged to, and did necessarily pay the same to *Martin*, as and for the arrears of the said annuity so due as last aforesaid. *Thirdly*, that after the making of the bond, *to wit*, on the 10th *April*, 1813, the defendant below having become insolvent, and unable to pay or satisfy the said annuity, and a certain sum, *to wit*, the sum of 300*l.* being then in arrear and unpaid by him on account of the annuity, it therefore became and was expedient and necessary for the plaintiff below to re-purchase and redeem the said annuity from *Martin*, under the stipulation and provision in that behalf contained in the said indenture, at and for a certain sum, *to wit*, the sum of 2925*l.* 14*s.* 2*d.*, and that thereupon the plaintiff below did accordingly redeem and re-purchase the said annuity from *Martin*, at and for that sum, and accordingly paid the same to him; and that the plaintiff below in endeavouring to redeem and re-purchase the said annuity, did unavoidably incur and sustain costs and charges amounting to 500*l.*, and was thereby injured and damnified to the amount of those two sums; and that although the defendant below had notice of the premises, and was requested to indemnify the plaintiff below from

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such payment, and to reimburse him the same; yet that the defendant below wholly refused and neglected so to do.

The defendant below pleaded, *first*, that he and one *Wm. Cooper*, were money scriveners in co-partnership. That they respectively became bankrupts. That a commission was accordingly issued against them on the 2nd *November*, 1812. That they were declared bankrupts under it on the 3rd. And that the defendant below obtained his certificate on the 9th *January*, 1813, and that it was allowed and confirmed on the 1st *February*, following. That the plaintiff below was surety for the debt of the defendant below before the commission issued; and that the several sums mentioned in the declaration to have been paid by the plaintiff below in respect of the said annuity, were paid by him as such surety after the issuing of the commission, and before a final dividend had been made thereon of the estate and effects of the defendant below; whereby the plaintiff below was enabled to prove his demand in respect of those several sums, as a debt under the commission. *Secondly*, that the defendant below had become bankrupt and obtained his certificate, and that the plaintiff below was surety for the debt of the defendant below before the commission issued, and that the several sums paid by the plaintiff below as such surety were paid after the issuing of the commission, and before any dividend; and that after the issuing of the commission, and before any dividend, *to wit*, on the 10th *April*, 1813, *Martin* proved the value of the annuity, and all arrears due thereon at the time of issuing the commission, amounting to 3433*l.* 9*s.* 10*d.* as a creditor under the same; whereby the plaintiff in error became entitled, after he had so repurchased and redeemed the annuity from *Martin*, to stand in the place of him (*Martin*), as to the dividends upon that sum so proved by the latter. *Thirdly*, as to the first breach of the condition in the declaration assigned, that the plaintiff below, before, and at, and after the time

of issuing the commission, was surety for the defendant below for the said annuity and the arrears thereof. That 150*l.* part of the said sum of 300*l.* in that breach mentioned, became and was due from the defendant below to *Martin*, (the grantee), as two quarters' arrears of the said annuity, *before the defendant below became bankrupt*; and that such arrears remained due and unpaid at the time of the bankruptcy, and as such were proveable as a debt under the commission; and that *Martin*, after the issuing thereof, *to wit*, on the 10th *April*, 1813, proved the said sum of 150*l.* as a debt from the defendant below to *Martin*, as being part of a larger sum, *to wit*, 198*l.* 9*s.* 2*d.* proved by *Martin* under the commission. And that the payment of 150*l.* part of the said sum of 300*l.* was made to *Martin* by the plaintiff below as such surety, after the issuing of the commission, and before any dividend was made under it; by reason whereof, the plaintiff below was entitled to stand in the place of *Martin* as to the dividends on the proof of the said sum of 150*l.*; and that the defendant below was discharged of the demand of the plaintiff below against him with regard to that sum. *Fourthly*, as to the second breach, that after the issuing of the commission, and before any dividend made, *to wit*, on the 10th *April*, 1813, *Martin* proved under the commission as a creditor, for the value of the annuity, which was ascertained and fixed at 3235*l.* That the payment of 1275*l.* for arrears, was made by the plaintiff as surety, *after the issuing of the commission*, and before any dividend made thereon; and that such arrears had accrued and become due for four years and one quarter of the annuity, after *Martin* had so proved under it as a creditor for the value of the annuity; by reason whereof, the defendant below was discharged of all demands of the plaintiff below against him in respect of such arrears. *Fifthly*, as to the third and last breach, that before, and at, and after the time of issuing the commission, the plaintiff below was a surety for the defendant below

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for the said annuity and arrears; and that the money for the redemption and re-purchase of the annuity, and costs and charges in respect thereof, was paid by the plaintiff below as such surety after the issuing of the commission, and before any dividend made thereon. By reason whereof, the defendant below was discharged against all demands of the plaintiff below, as surety as aforesaid, against the defendant below, in respect of the sum so paid for the redemption and re-purchase of the annuity and costs and charges aforesaid.

To these pleas, there was a general demurrer and joinder, which was argued in the Court of *King's Bench* in *Michaelmas* Term, 60 *Geo. 3*, and that Court, after consideration, gave judgment for the plaintiff below on all the pleas, except those which applied to the arrears due before the bankruptcy (a).

Mr. *Platt* for the plaintiff in error (b). The question, as it now comes before the Court, resolves itself shortly into this, *viz.* whether a surety, redeeming an annuity after the bankruptcy of the principal for whom such surety shall have become bound, is barred by the bankrupt's certificate from suing him for the amount of the money paid as a consideration for such redemption? That will depend altogether on the construction and effect of the 8th and 17th sections of the statute 49 *Geo. 3*, c. 121*. The sums sought to be recovered by the plaintiff

(a) See 3 *Barn. & Ald.* 192.

(b) This case was twice argued in the Court of *Exchequer Chamber*, first, in the last Term, when the Court took time to consider, and in consequence of Lord Chief Justice *Dallas* having retired shortly afterwards, it was ordered to be re-argued on this day.

* The eighth section enacts, "That in all cases of commissions of bankrupt already issued, under which no dividend has yet been made, or under which the creditors, who have not proved, can receive a dividend equally in proportion to their respective debts, without disturb-

below, arrange themselves into two classes, viz. the one, as far as it regards the arrears of the annuity which became due after the bankruptcy of the defendant below; and the other, as to the value paid to the grantee on its redemption. The plaintiff below, as surety for the defendant be-

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ing any dividend already made, and in all cases of commissions of bankruptcy hereafter to be issued, where, *at the time of issuing the commission*, any person shall be *surety for* or be liable for *any debt* of the bankrupt, it shall be lawful for such surety or person liable, *if he shall have paid the debt*, or any part thereof, in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to the dividends upon such proof; and when the creditor shall not have proved under the commission, it shall be lawful for such surety, or person liable to prove his demand in respect of such payment *as a debt* under the commission, not disturbing the former dividends, and to receive a dividend or dividends proportionably with the other creditors taking the benefit of such commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt after an act of bankruptcy had been committed by such bankrupt, provided that such person had not, at the time when he became such surety, or when he so became liable for the debt of such bankrupt, notice of any act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment."

By the 17th section it is enacted, "That it shall be competent to *any annuity creditor* of any person against whom a commission of bankruptcy shall issue after the passing of that act, whether the same shall be secured by bond or covenant, or bond and covenant, or by whatever assurance or assurances the same shall be secured; and whether there shall or shall not be or have been any arrears of such annuity at or before the time of the bankruptcy, to prove under such commission as a creditor, for the value of such annuity, which value the commissioners shall have power, and are thereby required to ascertain; and the certificate of every bankrupt under whose commission such proof shall be or might have been made, shall be a discharge of such bankrupt against all demands whatever in respect of such annuity, and the arrears and future payments thereof, in the same manner as such certificate would discharge the bankrupt, with respect to any other debt proved, or which might have been proved under the commission.

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low, was not himself liable to pay the value of the annuity, after the latter had obtained his certificate, the grantee having previously come in and made his election to prove for such value under the 17th section of the statute; and, consequently, the surety cannot afterwards recover from the bankrupt, as his principal, money paid by him as such surety to the grantee in respect of the annuity, as such payment was made by him in his own wrong. The policy and spirit of the statute 49 *Geo.* 3, is to allow an annuity creditor or grantee to prove under the commission, by virtue of the 17th section. And if he *elects* to do so, he is thereby precluded from any claims he might thereafter have, as against the surety of the grantor. The grantee was not bound to prove the value of the annuity as a debt under the commission, and his doing so was a mere voluntary act, and for his individual benefit; and having made such election, he thereby not only discharged the bankrupt from any future claims he might have on his estate, but discharged his surety also; and more particularly so, as he thereby prevented such surety from proving his demand in respect of such payment as a debt under the 8th section of the statute. A party who once elects to take any advantage which may accrue to him under the statute, must bear any burden which may be afterwards imposed on him by making such election. Even admitting that the plaintiff below could not have proved the sum paid by him to the grantee for redeeming the annuity under the 8th section of the statute, yet, as the latter had previously elected to come in and prove under the 17th section of the statute, he thereby discharged the bankrupt's estate from all future demands in respect of the annuity; and the principal demand as against him having been barred by the certificate, the accessory demand against him by the surety, must necessarily be barred also. The grantee, by claiming against the estate of the bankrupt, and electing to prove the value of the annuity under the commission,

declared his choice of remedies; and took his chance of a dividend in preference to relying on the liability of the surety, who might, in point of fact, be equally, if not more insolvent than the estate of the bankrupt. And if the grantee should suffer in the result, by having preferred the worse to the better alternative, no greater hardship would be imposed on him, than in those cases where a creditor, by making his election to prove under the commission, discharges the sureties of the bankrupt; and he must therefore be satisfied with obtaining the same proportion of his claim as the other general creditors. By the 14th section of the statute*, a creditor is precluded from proceeding in any action where he has elected to prove under the commission of his debtor, and the spirit of the act is intended to apply throughout, as to whether such election be made by the creditor or not. Here it is quite clear, that the proof of the annuity formed a charge on the bankrupt's estate, and burthened it with the full value of all arrears, and future

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* By which it is enacted, "That from and after the passing of that act, it shall not be lawful for any creditor, who has or shall have brought any action, or instituted any suit against any bankrupt, in respect of any demand which arose prior to the bankruptcy of such bankrupt or which might have been proved as a debt under the commission of bankrupt issued against such bankrupt, to prove a debt under such commission for any purpose whatever, or to have the claim of a debt entered upon the proceedings under such commission, without relinquishing such action or suit, and all benefit from the same; and that the proving or so claiming a debt under a commission of bankrupt by any creditor, shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed by him:—Provided always, that such creditor shall not be liable to the payment to the bankrupt or his assignees of the costs of such action or suit which shall be so relinquished by him: and provided also, that where any such creditor shall have brought any action or suit against such bankrupt jointly with any other person or persons, his relinquishing such action or suit against such bankrupt or bankrupts, shall not in any manner affect such action or suit against such other person or persons.

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payments as they might become due; and the surety was never liable to pay the value of the annuity, as there was no covenant in the deed requiring him so to do. It has been said, however, that although this might apply as against the principal, still, that it does not as against the surety, as he was not enabled to prove such value; and consequently, that he does not fall within the provisions of the statute. But it was the evident intention of the legislature, that, as the bankrupt, by the issuing of the commission, gave up all his effects to his creditors, so he should be released from all demands that might be thereafter made against him; and if so, how could the plaintiff below, as a mere surety, be called upon to pay the arrears or value of the annuity after his principal had obtained his certificate; and more particularly so, when there is no express covenant that binds such surety to redeem, but merely a proviso that he may do so. It never could be intended that the surety might redeem at his own pleasure, and then call on his principal for the sum advanced for such redemption; and consequently, the sum paid for the redemption of the annuity in question, was made by the plaintiff in error in his own wrong, as well as the sum paid by him for those arrears which became due after the bankruptcy of his principal; and he is thereby precluded from recovering as against him either of such sums. If the grantee had obtained any part of the value of the annuity after having proved under the commission, the surety could not have been liable for any future payments, and as he has elected to take such value, the surety can fix on no other sum in lieu of it; and there could not have been any apportionment under the terms of the deed. The estate of a bankrupt may eventually pay twenty shillings in the pound, whilst the circumstances of the surety might not enable him to pay one half, or even one-tenth part of that sum. It is therefore the interest, as well as the duty of the creditor to make his election against whom he will proceed. Besides, after-

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acquired assets by the bankrupt might be applied to the creditor's demand, so that he might eventually receive the whole of the arrears as well as the value of the annuity. It is quite clear, that, where a principal has made his election, and not only come in and proved, but received a dividend under a commission out of a bankrupt's estate, and has a future prospect of a further dividend, he is thereby precluded from suing the surety. — The principle applicable to this case bears a strong analogy to those of composition deeds, where a creditor who has agreed or elected to accept a composition, is thereby precluded from afterwards suing his debtor. In *Holmer v. Viner* (a), it was held that a party who had several distinct demands against an insolvent, could not prove one demand under a deed of composition, and resort to a surety at a subsequent period for the remainder; and Lord *Kenyon* there said (b), that "it was not to be allowed, that a party having several demands against an insolvent person, should split those demands, and come in under the composition deed for part, and sue for the remainder at a subsequent time; that such would be a fraud upon the other creditors, and defeat the very object of the composition, which was intended by the creditors to discharge the insolvent from all his debts; as well as be an oppression of the debtor, who had given up all his property to constitute a fund for their benefit." So, in *Stock v. Mawson* (c), where the creditors of a bankrupt entered into a deed of composition to receive eight shillings in the pound in full discharge of their debts, and agreed to release every thing beyond that to the bankrupt, and one of such creditors having two distinct debts due to him from the bankrupt, for one of which he held bills of exchange for the full amount, received his dividend of eight shillings in the pound on both debts, and then recovered the full value of some of the bills; — it was held that the nature of

(a) 1 Esp. Rep. 131. — (b) *Id.* 134. — (c) 1 Bos. & Pul. 286.

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the contract to accept a composition, precluded him from so doing; and that, if he should be deemed entitled to recover, it would operate as a fraud on the other creditors; and consequently that the money obtained by him on such bills, was received to the use of the bankrupt. — Even if it should be contended that the discharge of the bankrupt and principal demand does not in all cases discharge the surety and accessorial demand, still it must have this effect in the present instance, from the nature of the transaction itself; and the circumstance of the grantee having proved for the value of the annuity under the commission, is conclusive to shew that the statute was intended so to operate as to discharge the surety, as his obligation was thereby altogether changed. The object of the grantor of an annuity is to retain the use of the purchase-money, which he is not to be called on to repay, it being less inconvenient to him to pay the annuity; whilst that of the grantee is to receive a yearly payment for the principal sum advanced by him to the latter at the time the annuity was granted; the surety has nothing to do with the ulterior object or expectations of either of those parties, and it is doubtful whether he could redeem without the consent of one or both, as he would thereby destroy the annual payments to be received by the one, and create an immediate debt against the other. But, if on the other hand he had a right to redeem the annuity, the act of the grantee in proving the value would render redemption altogether impossible, as from that moment the amount of the purchase-money would no longer constitute the price of the re-purchase as stipulated, and it would put it out of the power of the surety to ascertain what other sum ought to be paid for the redemption. At all events, where a bankrupt has once obtained his certificate under the statute, he is discharged as against all the world from all liability either directly or indirectly, as well as against every person claiming by virtue of an annuity deed. The Court below, in holding that the sure-

ty could not prove for the value of an annuity redeemed by him as not being a *debt* paid, or a liability for a debt due, within the meaning of the 8th section, put too narrow and technical a meaning on the word *debt*, which was neither warranted by the intention of the legislature nor by the terms or object of the statute, which was passed with a view to operate beneficially, and in favor of the bankrupt; which must receive a liberal construction, and be therefore taken to extend to any charge or incumbrance to which he was subject. The surety, at the time of the bankruptcy, was bound to pay the annuity, and all future sums which should at any time become due in respect thereof. The whole charge of the annuity was therefore a debt due from the bankrupt in the first instance, and which if not paid by him, the surety was liable for, as *debitum in presenti, solvendum in futuro*; and if he chose to pay the purchase money and redeem the annuity, it is quite clear that he might have proved under the 8th section, as it would constitute a debt within the terms and meaning of that clause; for after the annuity had been redeemed by the surety, the grantee had no further claim against the bankrupt's estate; and the surety who had so far relieved it, ought to be entitled to prove a debt to the same amount.—Taking, therefore, the 8th section with reference to the 17th, the fair and just construction of both is, to give the word *debt* so comprehensive a meaning, as to include all existing charges or incumbrances on the bankrupt and his estate, and to which they were subject at the time of issuing the commission, as well as all liability of the surety in respect of such charges on him, in case of the bankrupt's default, to which charges both were then subject, and in respect of which the surety might thereafter become liable. When, therefore, the surety had redeemed the annuity, the grantee could not receive any dividend out of the bankrupt's estate; and the principal demand against him having been barred by his certificate,

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the accessorial demand against him by the surety was necessarily barred also; and this appears to have been the manifest intention of the legislature by the different provisions of the statute. The case of *Welsh v. Welsh* (a), relied on for the plaintiff below, is distinguishable from the present, on the very ground on which the argument for the plaintiff in error is founded, as there the grantee of the annuity had not elected to prove under the commission; and Lord *Ellenborough* said (b), "the surety cannot compel the annuity creditor to come in and prove, and it is not a debt *quoad* the surety, until he is in a condition to be damnified by it." Here, however, the grantee or annuity creditor, had proved for the value under the 17th section, and it was a debt *quoad* the surety in respect of which he might be damnified, and consequently would be, whenever the reputed value of the annuity should be ascertained, or if it should be thought prudent or proper to do so. In *Newington v. Keays* (c), it was held that the bail of a bankrupt who had been obliged to pay the amount of a judgment against their principal, were entitled to receive the money so paid, from the bankrupt after he had obtained his certificate; but that was determined not only on the ground that bail above were not sureties, or liable for the debt of the bankrupt within the 8th section of the statute 49 Geo. 3, but also on the principle, as there stated in argument, viz. that judgment not having been obtained when the commission issued, no debt existed for which the bail could prove, or were then liable; nor was it certain that the principal would fail in the action, or that any debt would be eventually established against him; nor could the bail be liable but in the event of a certain remote contingency, as their recognizance was in the alternative, namely, to pay the damages in case their principal did not do so, or render him-

(a) 4 Mau. & Selw. 333.—(b) Id. 334.—(c) 4 Barn. & Ald. 493.

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self. Although in *Inglis v. Macdougall* (a), it was held, that if a surety enter into a bond with a principal, conditioned for the performance of covenants contained in an agreement for a lease, such surety was still liable, although the principal became bankrupt, and was discharged under the 49 Geo. 3, c. 121; yet that case was determined on the construction of the 19th section of the statute, and the assignees not having accepted the lease of the bankrupt, his surety was still considered to be responsible. But in *Lingis v. Comyn* (b), where the plaintiff having, after judgment obtained, proved his debt under a commission sued out against the defendant, it was held, that he could not proceed against the bail, on the principle that he had made his election under the 14th section of the statute; and the Court ordered them to be discharged on motion, and said (c), "this statute was made in favor of bankrupts; but if the plaintiff's construction should prevail, it would not have the proposed effect, for the bankrupt would become liable at the suit of the bail, for the money which the bail should pay." Assuming, therefore, that the certificate would be a discharge to the bankrupt, the annuity creditor having come in and made his election to prove under the commission, he cannot afterwards be entitled to recover as against the surety of the bankrupt; nor can such surety maintain an action against his principal for the value of the annuity so redeemed by him.

Mr. *Joshua Evans* for the defendant in error, submitted, that the grantee had a right to recover the payment of the annuity from the surety, notwithstanding the bankruptcy of the grantor, and that the latter, as the principal, still remained liable for any loss which might have been incurred by the surety on his behalf, although he might have been himself discharged from the same demand as against

(a) 1 Moore, 196. — (b) 1 Taunt. 248. — (c) *Id.* 248.

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the grantee or annuity creditor; and consequently, that the bankruptcy and certificate of the principal, could not be pleaded in bar of an action founded on such liability of the surety, who was not in a condition to prove at the time the commission was issued. The cases of *Holmer v. Viner*, and *Stock v. Mawson*, even supposing they bore an affinity in point of principle to the present; yet they were decided before the statute 49 Geo. 3, was passed, and depended altogether on the effect and construction of a composition deed as between debtor and creditor. It has been said, however, that as the grantee has made his election, and proved for the arrears and value of the annuity, under the 17th section of the statute, he has thereby discharged the surety. But the mere circumstance of the value having been proved by the grantee or annuity creditor, under the commission, even although he might have received a dividend, would not preclude him from resorting to the surety also. It therefore can make no difference whatever in a case where he has merely come in and proved under the commission. Although it has been contended, that there was no express covenant by the surety, to pay any certain or definite sum for the redemption of the annuity, and that the sum so paid was in his own wrong; still, the mere proof of such value by the grantee under the 17th section, cannot vary the case in this respect: and the true principle on which the present action was founded, is, that there was no debt for which the plaintiff below was liable as surety at the time of issuing the commission, and consequently that he was not then enabled to prove it as against the bankrupt's estate; and if he paid it afterwards, it could not constitute a proveable debt. The bankrupt, therefore, still remained liable to him, and was not discharged by his certificate; and the pleas in bar offered no legal answer to the claims of the plaintiff below. His remedy as surety cannot depend on the mere voluntary act of the grantee, for in *Welsh v. Welsh*, it was de-

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cided, that a surety in an annuity deed, who was compelled by the annuity creditor, after the bankruptcy and allowance of the certificate of the principal, to pay several sums for arrears due after the issuing of the commission, was not within the 8th section of the statute, and consequently that he might have an action against the principal for such sums, and hold him to bail: and it is perfectly immaterial, whether the annuity creditor had come in and proved under the 17th section or not, for Lord *Ellenborough* said, "it is not a debt, *quoad* the surety, until he is in a condition to be damnified," that is, until he had paid the arrears due or value of the annuity on its redemption, as he was not before in a condition to prove for such value. In *Page v. Bussell* (a), it was held, that a person discharged under an insolvent act, (51 Geo. 3, c. 125), was liable to his surety for the arrears of an annuity due since his discharge, and which the surety had been obliged to pay:—and Mr. Justice *Bayley* there said, "even in the case of a bankrupt, if the annuity creditor does not come in and prove, but disregarding the bankruptcy, sues the surety, the surety cannot insist on the certificate; and if he cannot, may not the surety afterwards resort to the bankrupt? The present is a debt accrued since the debtor's discharge." So, here, the redemption of the annuity was a debt which accrued to the surety after the commission sued out against his principal. In *Hoffham v. Foudrinier*, Lord *Ellenborough* said (b), "that it was essential that a party should be a creditor of the bankrupt at the time of the bankruptcy, and that if this were not shewn, the argument upon the statute failed; but Mr. Justice *Bayley* went still further, and observed, that the plaintiff was not a creditor of the defendant at the time of his bankruptcy, as he could not have made the affidavit necessary to prove a debt." So, here, the value of the annuity was not ascertained at the time the commis-

(a) 2 Mau. & Selw. 551. — (b) 5 Mau. & Selw. 24.

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sion was issued, and consequently cannot be considered as a debt within the provisions of the statute.

The case of *Inglis v. Macdougall*, is decisive to shew, that a surety is not protected by the bankruptcy of his principal, but continues liable, although the latter may have been discharged under the statute; and Lord Chief Justice *Gibbs* there said, "it is impossible to conceive that the legislature intended to discharge those sureties who have been required to give security, although the bankrupt might be no longer answerable for payment; as persons would not give credit, unless such sureties were responsible. The very object of taking sureties, is to provide against the insolvency of the principal; and the object of the insolvent acts and statutes applying to bankrupts, is to discharge debtors and bankrupts from obligations, but not to disturb the claims of creditors on other persons as sureties, from the failure of such debtors or bankrupts." And his Lordship went on to observe, that "by the 17th clause of the 49 Geo. 3, the bankrupt is discharged from annuity creditors, but the sureties are not thereby discharged. It could not have been intended, that if a bankrupt be unable to pay, the annuity no longer exists; and that the sureties also are exonerated from payment." And Mr. Justice *Dallas* said, "the only object of sureties is to provide for the solvency of the principal; although the bankrupt be no longer liable, the sureties are; and the statute 49 Geo. 3, applies only to the mere personal discharge of the bankrupt, and not of the sureties also." But the late case of *Macdougall v. Paton* (a), and which was decided on the authority of *Welsh v. Welsh*, is conclusive to shew, that to render a person liable as surety, or for the debt of a bankrupt, within the meaning of the words of the 8th section of the statute, such debt must exist as a debt at the time of the is-

(a) 2 Moore, 644. S. C. 8 Taunt. 584.

suing of the commission; and the Court of Common Pleas, consequently held, that in an action of *assumpsit* for money paid, and brought by a surety to recover from a bankrupt the arrears of an annuity paid by such surety after the issuing the commission, and before a final dividend was made, the bankruptcy and certificate did not furnish a good defence to the action.—As far as regards the rights of the creditor against the surety, he is not precluded from resorting to the latter, although he had proved the debt and received a dividend under the commission; for in *Martin v. Brecknell* (a), where a bond was given by a principal and his surety, conditioned for the payment of money by instalments, and the obligee proved the *whole* debt under a commission against the principal, and received a dividend thereon of two shillings and seven pence in the pound; and afterwards commenced an action against the surety for an instalment that became due the day the dividend was paid; it was held, that the obligee was entitled to recover such instalment against the surety, making a deduction of two shillings and seven pence in the pound on the amount of such instalment, and that the surety was only entitled to have the dividend applied rateably in part payment of each instalment as it became due. The same principle was established in *Ex parte Hughes* (b), where the court observed, that the legislature considered the proof against the principal as a benefit to the surety, by relieving him *pro tanto* from the debt; and it was there considered that the proof of the debt under the commission, was not an election under the 14th section of the statute, so as to preclude the creditor on that ground. So, in *Soutten v. Soutten* (c), where a surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of a bankrupt, who had

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(a) 2 Man. & Selw. 39.——(b) 5 Barn. & Ald. 482.——
(c) 5 Barn. & Ald. 852.

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proved under the commission, and thereupon satisfaction was entered on the record; it was held that this did not fall within the eighth section of the statute, as being a payment of part of a debt in discharge of the whole; and consequently, that the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him, as the eighth section only applied to cases where a surety had paid the whole debt, or a part in discharge of the whole. The case of *Mead v. Braham*, was decided on the same principle, where the holder of a bill having proved it under a commission against the acceptor, and the drawer afterwards paid the amount to the holder, it was held, that the proof of the holder was not an election binding upon the drawer, so as to preclude him from bringing an action upon the bill against the acceptor.—Here, the grantee had no election, but was bound to prove under the seventeenth section; and by proving for the value as a debt, he thereby benefited the surety *pro tanto*; and, consequently, did not discharge him, as he would have been in a far worse situation, in case the annuity creditor had not come in and proved such value. With respect to the objection, that the surety had no authority under the deed to redeem the annuity, there is an express clause in the instrument itself,—by which he reserved to himself the privilege or right of redemption; and it was the manifest intention of the parties, that either might re-purchase or redeem the annuity; and that the surety not having done so until after the bankruptcy, the bankrupt, as his principal, would be liable to him accordingly. As to whether the bankrupt was discharged by his certificate from all claims in respect of the annuity, under the operation of the eighth and seventeenth sections of the statute as taken together, there is no legal foundation for such a proposition; for it is quite clear, that the value of the annuity could not be considered as a *debt* for which the surety was liable at the time of issuing the commission, as the former section applies only to those

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cases where the surety is in a condition to prove at that time; and the value could not be considered as a debt, until it had been ascertained by the commissioners. And the case of *Newington v. Keeys*, is decisive to shew that bail above are not sureties within the meaning of that section. So, in *Hewes v. Mott (a)*, it was determined, that bail to the sheriff, whose principal had become bankrupt, could not be considered as sureties within the meaning of that section, although they were liable to the payment of the debt in the event of certain contingencies. Although, therefore, the arrears of an annuity may in some cases constitute a debt, yet, a sum paid by the surety voluntarily for its redemption, and after the commission, and which the grantee could never compel, although it operates to relieve the surety *pro tanto*, or to exonerate him from any future charge, still, it cannot be considered as a debt due when the commission issued; and it is equally clear, that the bankrupt in this case is not discharged by his certificate from the claims of the plaintiff below, for the money paid by him to the grantee, as being a demand in respect of the annuity, under the operation of the seventeenth section of the statute; as that clause relates to the proof by the grantee alone, and cannot by any possibility be taken to apply to or affect the surety. Although the 14th section has been relied on for the plaintiff in error, to shew that the legislature meant to put the annuity creditor to an election, yet the provision at the close of that section shews, that it was not intended that the bankruptcy should operate as a discharge, or prevent a recovery against all persons connected with the bankrupt jointly with another person. As, therefore, the grantee in this case alone could prove the value of the annuity under the statute, and the surety could not, it is manifest that it constituted no debt for which the latter was liable at the time the commission was is-

(a) 6 Taunt. 329. S. C. 2 Marsh. 192.

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sued, nor a liability to any debt of the bankrupt's, on the part of the surety at any time afterwards; but when the value was ascertained and proved, and not until then, it subjected the principal to a demand on the part of the surety; which, in this case, did not arise until after the certificate was obtained. It is therefore operative in effect as against the defendant in error as his surety; and being so, furnishes no discharge to the bankrupt, (the plaintiff in error), either on principle, reason, or authority.

Mr. *Platt* in reply, submitted, that the cases which had been cited and relied on for the defendant in error, were distinguishable, if not inapplicable to the present question; or at all events, that they did not establish any proposition, so as to sustain the judgment of the court below; and more particularly so, as to the redemption of the annuity by the surety, after the commission had issued against his principal. The eighth and seventeenth sections of the statute must be taken with reference to each other; and no decision has established the principle, that a surety can be considered as liable to his principal who has become bankrupt, after the grantee has made his election and proved the value of the annuity under the seventeenth section; and more particularly so, as all the previous determinations have been in favor of a liberal construction of the statute. The grantee, by electing to come in and prove, takes the benefit of any dividend that may be thereafter made; and although such dividend may not be paid before the value is ascertained, it still makes no difference in point of principle, as the act of proof by the grantee or annuity creditor has the effect of discharging the surety altogether. In *Page v. Bussell*, the surety was compelled to pay under the express terms of the insolvent act; and Mr. Justice *Bayley* merely observed, that "in the case of a bankrupt, if the annuity creditor did not come in and prove, the surety could not insist on the certificate; and that if

he could not, the surety might afterwards resort to the bankrupt." Here, however, the creditor not only came in, but actually proved the value of the annuity under the seventeenth section of the statute. In *Macdougall v. Paton*, it did not appear that the creditor had come in and proved the debt under the commission, and although that case was decided on the eighth section of the statute, yet the party was not a surety for the payment of an annuity, but merely for the performance of certain things contained in articles of agreement for the payment of rent. Therefore, where no rent was due or in arrear at the time of suing out the commission, such rent could not be considered as a debt proveable under it. In *Martin v. Brecknell*, and that class of cases, the sum proved under the commission and claimed from the surety was money ascertained, so that the surety had a fixed and certain demand against his principal, and no liability attached to him in respect of a contingent sum. Here, however, the annuity creditor made his election, and proved for the value of the annuity, and thereby wholly changed the condition of the parties; and it is morally impossible for the surety to ascertain what sum such creditor might eventually be entitled to receive, or recover as against him. In *Ex parte Hughes*, although the question arose on the construction of the fourteenth section of the statute, still, in point of fact, it was, whether an attorney, who, in order to obtain papers belonging to *A. B.* in the hands of his former attorney, who had a lien upon them for the amount of his bill then in dispute, had undertaken that *A. B.* should enter into a reference;—was discharged from that undertaking, by proof of the debt in which that undertaking was accepted; and which is wholly beside the present question. In *Soutten v. Soutten*, the creditor was not an annuity creditor; and in *Mead v. Braham*, it was held, that the proving the debt under the commission, could only be deemed an election so far as it personally regarded the creditor who proved; but that

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it should not affect the right of third persons. In *Welsh v. Welsh*, the annuity creditor had not proved the debt, nor had the surety been damnified; and *Hoffham v. Foudrinier*, was decided on the ninth section of the statute; and Lord *Ellenborough* in the commencement of his judgment, said, "this is not an annuity, but a gross sum payable by instalments." It must be also observed, that all those cases are mainly distinguishable from the present, on the ground that the surety had neither been damnified nor in a condition to be so. With respect to the cases as to the liability of bail, they are wholly beside the present question, as the recognizance in the case of bail to the sheriff is in the alternative, to pay the damages if the principal does not do so, or render himself; and in the bail-bond, the condition is for the defendant's appearance according to the exigency of the writ. The liability of bail, therefore, is not only uncertain in amount, but contingent in effect. On these grounds, the certificate obtained by the plaintiff in error, operates as a bar, and discharges him from his liability to pay the sums claimed by the defendant in error, either for the arrears, or for the redemption of the annuity.

Lord Chief Justice GIFFORD delivered the judgment of the Court as follows:—This was a writ of error from the Court of *King's Bench*, in an action of debt, brought by the plaintiff below, (defendant in error), against the defendant below, (plaintiff in error), on a bond executed by the latter to the former, bearing date the 5th March, 1811, in the penalty of 4200*l.* The bond, after reciting an indenture of the same date, by which the defendant below granted an annuity of 300*l. per annum* to *James Martin*, and which the defendant below covenanted to pay; and that the plaintiff below also covenanted with *Martin*, that in case the defendant below did not pay the annuity, he the plaintiff below would, and also reciting a warrant of attorney from

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the defendant and plaintiff below to *Martin*, for 4000*l.*; was conditioned as follows, *viz.* that if the defendant below, his heirs, &c. should from time to time, and at all times thereafter, well and sufficiently save, defend, keep harmless and indemnified the plaintiff below, his heirs, &c. of, from, and against the payment of the said annuity of 300*l.*, and every or any part or parts thereof, and of and from the payment of extra premium for insurance, loss, costs, charges, damages, and expenses; and also of and from all the covenants, conditions, provisoes, declarations and agreements in the recited indenture and warrant of attorney respectively contained, and of and from the payment of all sums of money thereafter to grow due thereon, or become payable in respect or by virtue thereof, and of, from and against all actions, suits, loss, costs, charges, damages and expenses whatsoever, which should or might be brought, carried on, or prosecuted against the plaintiff below, or that he, his heirs, &c. should or might at any time thereafter bear, pay, sustain, or be put unto by reason or means of the non-payment of the said annuity, and also by non-payment of such extra premium for insurance, loss, costs, &c. &c. or by reason of the plaintiff below having executed the thereinbefore recited indenture and warrant of attorney respectively, or in any wise howsoever relating thereto, then the obligation was to be void.—The declaration then alleged, that it was by the said indenture stipulated and provided, that the plaintiff and defendant below, or either of them, or the heirs of the plaintiff below, might re-purchase the annuity on paying all the arrears thereof, and all such extra premium for insurance, losses, costs, &c. as should have been paid or sustained by *Martin* the grantee, for the sum of 2175*l.*; and assigned for breaches of the condition of the bond, *first*, that on the 5th *March*, 1813, the sum of 300*l.* became due to *Martin*, and that as the defendant below would not indemnify the plaintiff below from the payment of the same, he was after-

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wards obliged to, and did pay the same to *Martin*; and *lastly*, that after the making of the bond, *to wit*, on the 10th April, 1813, the defendant below having become insolvent, and unable to pay the annuity, and the sum of 300*l.* being then in arrear, it became expedient and necessary for the plaintiff below to redeem and re-purchase the said annuity, for the sum of 2925*l.*; and that he did so re-purchase it, and in so doing incurred costs and charges to the amount of 500*l.* It is not necessary to enumerate the various pleas which the defendant below has filed to this declaration. The result of them is, that he having become bankrupt, and (*Martin*) the grantee of the annuity having proved the value, (as he was entitled to do), under the seventeenth section of the statute 49 *Geo. 3*, and the defendant below having afterwards obtained his certificate, he was thereby released or discharged from paying the plaintiff below any part of the sums paid by him for the arrears and redemption of the annuity; for the payment of which by the principal to the grantee, the plaintiff below had become bound as surety in the deed, and for the re-payment of which this action was brought. The first breach of the bond as assigned in the declaration is entirely out of the question, as the judgment of the Court below is perfectly correct in that respect, as it has been admitted that the arrears of the annuity due before and at the time of the bankruptcy, constituted a debt, which the surety might have proved under the commission by virtue of the eighth section of the statute; and consequently, that the certificate operated as a bar to any claim as to such arrears. The only remaining question then is, as to whether the plaintiff below was entitled to recover the subsequent arrears, and the sum eventually paid by him for the redemption of the annuity. It has been admitted, that, but for the statute 49 *Geo. 3*, the defendant below would not have been released by his certificate from the claims made upon him by the plaintiff below under the indemnity bond, for

the money paid by him as the surety of the former for the redemption of the annuity. The question, therefore, certainly depends and turns solely on the construction and effect of that statute. The section under which a surety is permitted or enabled to prove, is the eighth; according to the terms of which, a surety, who has paid *the debt* or any part thereof in discharge of the whole debt, may, if the creditor has proved the debt under the commission, stand in his place as to the dividends upon such proof; or if the creditor has not proved, such surety may prove his own demand in respect of such payment as a debt under the commission. [Here his Lordship read the whole of that section.] Was then the value of the annuity in question a debt, supposing the grantee of the annuity had not come in and proved under the commission, which the surety could have proved under that section. In order to determine that point, it is necessary to ascertain what the seventeenth section enables the grantee to do. Before the statute was passed, where the annuity was secured by a bond with a penalty, if the bond had become forfeited, the grantee might have come in and proved the debt under the commission; but he could not have done so where the annuity was secured by covenant. [Here his Lordship read the seventeenth section.] The grantee has a special power given to him by that section, under the name of an annuity creditor, to prove for the value of the annuity as a debt, whether the annuity were secured by bond or covenant, or bond and covenant; and which value the commissioners were empowered and thereby required to ascertain.—We were, however, much pressed in argument, that the election of the grantee to come in and prove for the arrears and value of the annuity under the commission, was a voluntary act on his part as such annuity creditor. But we do not consider it to be so; as, if he had not done so, his debt would have been barred by the certificate, and he could afterwards derive none of the fruits in respect of the

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annuity or arrears and future payments thereof; because the seventeenth section provides that the certificate of every bankrupt, under whose commission such proof shall be or *might have been made*, shall be a discharge of such bankrupt, in the same manner as such certificate would discharge him with respect to any other debt proved, or which might have been proved under the commission. This, therefore, cannot be said to be a voluntary act on the part of the annuity creditor. Were then the arrears or value of the annuity a debt proveable under the seventeenth section of the statute? If so, it is quite clear the annuity creditor ought to have come in and proved. The true question then is, whether, if he had omitted to do so, the surety could have proved the value, or in other terms, whether the obligation imposed on him as such surety, a liability for a debt of his principal, (the bankrupt), at the time of issuing the commission against him. We are of opinion that it could not; as by the terms of the statute, the grantee alone is enabled to prove the amount or value of the annuity. Could then the surety in this case have proved for such value under the eighth section of the statute? There are no words in that clause which would have enabled him to do so, as it only permits a surety to prove a *debt*. The value of an annuity cannot be considered as a debt due at the time of the bankruptcy, but only the arrears then actually due. How then could the surety prove such value as an existing debt, when the grantee himself could not have done so, before the statute in question was passed? Or how can the surety be considered as falling within the eighth section, when at the time of the bankruptcy, or issuing the commission, there was no debt, except the arrears of the annuity, then due, for which he was liable, or which he could have proved under it? After the bankruptcy and certificate, he still remained liable on the covenant in the indenture, as well as by the condition of the bond, to damages for breaches from time to time for non-pay-

ment of the annuity, or all sums to grow due thereon, or become payable in respect thereof. He was consequently entitled to recover over against his principal, (the bankrupt), although he had obtained his certificate. It has been said, however, in the course of the argument, that the sum paid by the surety for the redemption of the annuity was done voluntarily, and that it was not compulsory on him to have made such payment; and that as he had done so without the consent of his principal, he could not recover as against him for what he had so paid of his own act and in his own wrong. But it is expressly provided or stipulated by the deed, that either the grantor or his surety might re-purchase or redeem the annuity at any time, on giving seven days notice to the grantee, and paying all the arrears of the annuity, and all such losses, costs, and charges as should have been paid or sustained by the latter; and the third breach in the declaration is framed accordingly, and states that the grantor having become insolvent, and unable to pay the annuity, and a certain sum being then in arrear, it became expedient and necessary for the plaintiff below, as his surety, to redeem and repurchase the annuity, and that he accordingly did so. Having therefore such a power under the express clause of the deed, he had unquestionably a right to redeem, if he should find it expedient so to do, or he might endeavour to make the best terms he possibly could with the grantee; his principal the grantor, being no longer able to pay or satisfy the arrears of the annuity then due. There can be no doubt, but that under the circumstances, it was highly expedient for all parties that the annuity should be paid off or satisfied, and as soon as the surety had re-purchased or redeemed it in diminution or discharge of his own liability, he had a right to call on his principal to reimburse him according to the condition of the bond; and he was consequently liable to refund to his surety the money so paid to the grantee for the redemption of the annuity. There

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is consequently no objection in point of law to the third breach, as assigned in the declaration; and we are therefore unanimously of opinion, that the judgment of the Court below was perfectly right;—and for the reasons above stated, it must be

Affirmed.

Thursday,
Jan. 29th.

DODINGTON v. HUDSON.

A personal demand is absolutely necessary to bring a person into contempt, in order to proceed against him by attachment:—Therefore, where a defendant was served with a rule of Court, requiring him to reinstate premises belonging to the plaintiff *forthwith*, according to an agreement entered into by him to that effect at the trial:—Held, that an attachment could not be issued against the defendant for disobedience of such rule, on being merely served with it, by the plaintiff's agent, but that a personal demand should have been made on him to comply with it in terms, at the time of such service.

THIS was an action on the case, and brought by the plaintiff as reversioner, for an injury done to his dwelling house, by the defendant's pulling down a partition which separated his premises from the plaintiff's. At the trial, at the Summer Assizes for the county of Surry, 1822, on the plaintiff's counsel being about to prove the nature of the injury and extent of the damage done, it was proposed for the defendant, that in the event of a verdict being found for the plaintiff, the injury should be repaired, and the plaintiff's premises reinstated by the defendant; and he undertook to enter into an order of *nisi prius* to that effect. A verdict having been found for the plaintiff, the defendant, in *Michaelmas* Term, 1822, obtained a rule, calling on the plaintiff to shew cause why it should not be set aside, which rule was discharged in *Easter* Term, 1823; and the defendant having refused to enter into the order as agreed on at the trial, the plaintiff, in *Trinity* Term following, obtained a rule, calling on him to shew cause why he should not *forthwith*, at his own expense, reinstate the plaintiff's premises, in respect of which the action was brought; or why the associate should not draw up an order of *nisi prius* to that effect, according to the agreement entered into at the trial. On the defendant's shewing

cause against that rule, on affidavits, stating that he could not comply with the terms of the agreement as entered into by him without incurring penalties under the building act (a), it was referred to an arbitrator to settle what sum should be paid to the plaintiff for reinstating his premises, and that the plaintiff should be at liberty to indorse such damages on the *postea* instead of nominal damages. The award having been set aside in *Michaelmas* Term last, on the terms of the plaintiff's being at liberty to enforce the defendant's agreement to enter into the order of *nisi prius* for his forthwith reinstating the premises. —

Mr. Serjeant *Peake*, on the first day of this Term, obtained a rule to shew cause why an attachment should not be issued against the defendant, for his not complying with the terms of that agreement; and he founded his motion on an affidavit of the plaintiff, which stated that the order of *nisi prius*, for reinstating the premises, had been drawn up in the course of the last Term, and shortly afterwards made a rule of Court, a copy of which rule had been personally served on the defendant, by the plaintiff's authorised agent, and the original shewn him at the time of such service, but that the premises had not been reinstated, nor had the defendant ever commenced to comply with the terms of the rule, or even indicated an intention to do so.

Mr. Serjeant *Vaughan* and Mr. Serjeant *Taddy* now shewed cause, on affidavits of the defendant and his surveyor, which stated that he could not comply with the terms of the agreement as entered into at the trial, without incurring penalties under the building act; and the reason assigned for his resisting the rule of Court as founded on that agreement was, that the partition pulled down by him having been erected previously to the passing of that statute, and inconsistently with its enactments, the defendant could not reinstate the plaintiff's premises, or restore

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(a) 14 Geo. 3, c. 78.

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them to their former condition, without violating the terms of the act. It appeared, however, that on serving the rule of Court, the plaintiff's attorney or agent merely served the defendant with a copy of the rule, but made no personal demand on him forthwith to reinstate the premises, or comply with the terms of the rule. It was, therefore, insisted, that the defendant could not be in contempt so as to be liable to an attachment, unless a personal demand had been made on him by the plaintiff, or some one authorized by him, either to reinstate the premises, or to comply with the terms of the rule at the time of the service: and the case of *Brandon v. Brandon (a)*, was relied on, where it was held that an attachment for not paying a sum of money pursuant to an award, cannot issue before a personal demand has been made; although the time and place for payment of the money awarded was specified in such award; and it was submitted, that such demand was not confined to the issuing an attachment for non-payment of money, but must be shewn in all applications to the summary jurisdiction of the Court in proceedings of such a nature.

Mr. Serjeant *Pell*, and Mr. Serjeant *Peake*, in support of the rule, admitted that a personal demand was generally necessary to warrant the issuing of an attachment, or to bring a party into contempt for disobedience of a rule or order of Court. Still, however, this case in its circumstances formed an exception to such general rule, which only applied to a case of wilful disobedience, which could not be complete without the intervention of two parties, as in the case of an order to pay money pursuant to an award at a particular time and place, where there must be two persons, viz. the one to pay, and the other to receive, and unless the latter make a formal or personal demand at the time, the former would not be bound to pay, nor would he be guilty of a contempt in case of refusal. So, there must

(a) 1 Bos. & Pul. 394.

be a positive affidavit of personal service of an award, and the money under it must be demanded at one and the same time, because that alone brings the party into contempt. Here, however, there was no act to be done by the plaintiff or his agent, but by the defendant alone; for he positively agreed to reinstate the premises forthwith, and not on any demand being made on him to repair; and he afterwards stated in his affidavit, that he could not comply with the terms of the order without violating the provisions of the building act: that, therefore, was equivalent to his stating in terms that he would not comply with the rule of Court which required him to reinstate the premises forthwith, and in the first instance. It was consequently unnecessary to make a personal demand on him for its compliance; and more particularly so, as the defendant was to make such reinstatement immediately, and at his own expense; so that the service of the rule was of itself as full and complete a demand as the nature of the case would admit, to bring him into contempt of an order of the Court. And it has been sworn, that although a copy of the rule had been served, and the original shewn him, yet, that he had refused to comply with it, nor had he even begun to reinstate the premises according to the original stipulation as entered into at the trial.

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Lord Chief Justice GIFFORD.—This is an application to the summary jurisdiction of the Court, and calls upon us to enforce the performance of a rule or order of Court, by causing an attachment to issue against the defendant for a contempt, in not having complied with it in terms. All the authorities shew, that before an attachment can be enforced, the party proceeded against must be proved to have been guilty of a wilful disobedience of such rule; and if that be not fully and satisfactorily made out, the Court will not interfere, as in the case of *Brandon v. Brandon*, where, by the terms of an award, a party was

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required to pay a sum awarded, between the hours of ten and twelve on a certain day, at a particular coffee-house. It was his duty to have attended there within the appointed time, and if he failed to do so, he would have been liable to an action for not complying with the terms of the award; in which it would have been sufficient to shew, that he did not attend as required by the award; and he would have no substantial defence to such an action. But the law is different with respect to an attachment; and although Lord Chief Justice *Eyre* in that case was of opinion, that the reason for naming a particular time and place in the award, was to supersede the necessity of a personal demand, yet the rest of the Court declaring themselves to be of opinion, that a personal demand was necessary to warrant the issuing of the attachment, his Lordship said, "that although he submitted to the practice, he continued to think, that, on principle, a personal demand was unnecessary." But he yielded with reluctance to the prevailing practice of the Court, which, it was stated, required a personal demand, before a party could be brought into contempt, so as to warrant the issuing of an attachment against him. Here, however, it has been insisted, that there is a manifest distinction between an order for the payment of money and an order for the reinstatement of premises, or repairing a building; and that the reasons which make a personal demand necessary in the one case, do not exist in the other; and more particularly so, as in this case the defendant was bound to set about reinstating the premises forthwith from the service of the rule. The difficulty, however, I feel is, that the person applying for an attachment, must shew some wilful disobedience of the rule of Court, in order to bring the party to be charged into contempt. Here, therefore, when the rule was served on the defendant, the person serving it should have demanded or required him to begin to set about the work immediately, or to reinstate the premises forthwith according to the terms of the rule; and he might

then perhaps have alleged some excuse for not proceeding to an immediate performance. It is with great reluctance I feel myself bound to consider that the objection raised as to the want of a personal demand, is a good and valid objection; and consequently that this rule must be discharged, although, under the circumstances, without costs. I forbear to express any opinion on the merits of the case; but the defendant must be fully aware, that, by refusing to comply with the terms of the rule, he is only putting off the evil day for a short period, and he will eventually find that no sufficient excuse can be raised by him for not reinstating the premises according to his original undertaking.

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Mr. Justice PARK. — On looking at the case of *Brandon v. Brandon*, and seeing the great reluctance with which Lord Chief Justice *Eyre* submitted to the practice of the Court, and the opinions of the other Judges, who thought, after time had been taken for consideration, that a personal demand was necessary to warrant the issuing of an attachment; I own I am fearful to act contrary to that decision. No great mischief will ensue by our holding it to be necessary for parties to adhere to that practice; and in proceedings of a criminal nature, it is generally the most prudent course to adhere most strictly to the practice of the Court. Although in this case there appears to have been great vexation and delay on the part of the defendant, yet this rule must be discharged on the objection that has been taken; but it is to be trusted that he will now consider the situation in which he stands, and act accordingly.

Mr. Justice BURROUGH. — This being in the nature of a criminal proceeding, it was incumbent on the party applying for the attachment, to shew that the defendant had been guilty of a wilful disobedience of the order or rule of Court. The plaintiff, therefore, must instruct his agent to serve

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it again, and make a personal demand on the defendant at the time, requiring him to comply with the terms of the rule, as well as the nature of the thing to be done, *vis.* to reinstate the plaintiff's premises forthwith. It was found by the verdict that the defendant had materially injured the plaintiff's house, and he agreed at the trial to reinstate the premises, and entered into a rule for that purpose, but he has ever since and still refuses to do so. By the order to reinstate the premises, he was bound to erect a new partition conformably to the provisions of the building act, although he might be obliged to encroach on his own land, the increased expense of such an erection having been imposed on him by his own conduct in having improperly pulled it down in the first instance.

Rule discharged without costs.

Saturday,
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CAPON v. DILLAMORE.

(In Error.)

Where, on opposing bail in error, one of them admitted that his son had told him that the attorney for the plaintiff in error had said, that if he (the father), became bail, he should come to no harm—the Court ordered him to be rejected, and refused to allow further time to put in and justify other bail.

Mr. Serjeant *Pell* opposed the justification of bail in error in this cause, on the ground that one of them had been indemnified by the attorney for the defendant below, (plaintiff in error). On the question being put to him, the bail admitted that his son had told him that the attorney would see that he came to no harm, but that he had offered to become bail before that communication was made to him.

Mr. Serjeant *Vaughan*, *contra*, submitted, that as the undertaking was to be answerable for the debt of another, and merely made to the son of the proposed bail, it should have been in writing to make it binding on the attorney.

But the Court overruled the objection, and on interrogating the bail as to whether he did not come up to justify, in consequence of what his son had said to him, and whether he did not rely and act on the communication so made;—on his admitting that he expected that he should not suffer any inconvenience by becoming bail, he was ordered to be rejected; and

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Mr. Justice PARK observed, that the son might be called as a witness to prove what the attorney had said, as to his indemnifying the bail from any consequences that might arise to him from his justifying.

Bail rejected.

Mr. Serjeant *Vaughan* then applied for time to put in and justify other bail, and observed, that although it was contrary to the usual practice, still, that the late Lord Chief Justice *Mansfield* had allowed it to be done in the case of *Gillett v. Mawman* (a), where there were two cross actions, and time was allowed for other bail in error to add and justify, although one of them had been rejected.

But the Court observed, that it must have been done there from the peculiar circumstances of the case. That, here the objection was well taken, and that there was no doubt but that the bail had been properly rejected (b).

(a) See 1 Taunt. 137. 2 Taunt. 325, n.

(b) Although it is a general rule not to grant time in the case of bail in error, yet if such bail are prevented from coming up to justify, in consequence of any improper communication or misconduct on the part of the plaintiff in error, or his attorney, it seems that time may be granted. See *Dyott v. Dunn*, 1 Dow. & Ry1. 9. But see 2 Tidd, 7th edit. 1200. 2 Wils. 144.

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Saturday,
Jan. 31st.

THE KING v. THE SHERIFF OF WILTSHIRE, In a cause of
MILLER v. BRIDGES.

Where a writ was returnable on the morrow of *All Souls*, viz. on the 3rd November, and the defendant surrendered himself to the sheriff's officer on that day, and went to prison on the 5th, and the sheriff having been ruled to bring in the body, returned that he had taken the defendant, whose body he then had ready, and an attachment was afterwards issued against the sheriff for not bringing it in; the Court set aside the attachment on the payment of all costs as between attorney and client, and allowed the return to be amended according to the fact.

THE defendant, *Bridges*, was arrested on a writ of *capias ad respondendum* issued out of this Court at the suit of *Miller*, on the 20th of August, 1823, directed to the sheriff of *Wilts*, on which he gave a bail-bond to the said sheriff. The writ was returnable on the morrow of *All Souls*, being the 3rd of November last, on which day, *Bridges* surrendered himself to the sheriff's officer, and to the county prison on the 5th: the sheriff having been ruled on the 17th to bring in the body, returned that he had taken the defendant *Bridges*, whose body he then had ready, as by the writ he was commanded. An attachment having afterwards issued against the sheriff, for not bringing in the body according to his return—

Mr. Serjeant *Peake*, on a former day in this Term, obtained a rule *nisi*, that this attachment might be set aside on payment of the costs of the application, and the return amended according to the fact, *namely*, by stating that the sheriff had taken the defendant *Bridges*, whose body remained in the prison of our lord the king, under the custody of him the said sheriff.

Mr. Serjeant *Vaughan* now shewed cause, and submitted, that the application should have been made in the course of the last Term, as the defendant had surrendered himself on the return day of the writ, *namely*, the 3d of November, and he produced an affidavit, which stated that the plaintiff's attorney attended a summons before a Judge at chambers on the 12th, to shew cause why the defendant should not have time to put in bail.

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Mr. Serjeant *Peake*, in support of the rule, observed, that the brief in support of this application, had been, in point of fact, delivered to him on the 27th of *November* last, but that he did not think it prudent to move, it being the last day but one of the Term. The defendant having given a bail-bond on his arrest, it did not affect the sheriff, provided he surrendered himself before the return of the writ, and the sheriff chose to accept such surrender; for in *Jones v. Lander* (a), it was determined that if a defendant who has given a bail-bond, surrender himself before the return of the writ, the bail-bond may be given up, and the Court will consider it as if no such bond had been given. Here the writ was returnable on the morrow of *All Souls*, being the first general return day of the last *Michaelmas* Term; and although that return was on the *essoign* day, still, as the actual business of the Court did not begin until the 6th, it must be considered as the first day of Term, on which the defendant was bound to appear; and consequently, a surrender at any time before that day was sufficient; for in *Plimpton v. Howell* (b), where the principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff before twelve o'clock on the first day of Term, being the return day of the writ; and the undersheriff signified his assent to the surrender by return of post the next day, at the distance of seventeen miles; it was held sufficient to discharge the bail-bond, which the plaintiff had taken an assignment of afterwards, with notice of such surrender. So, here, the sheriff accepted the surrender of the defendant in discharge of the bail-bond, and he was in the actual custody of the gaoler before the first day of the last *Michaelmas* Term.

The Court observed, that, in point of strictness, the application to set aside the attachment should have been made

(a) 6 Term Rep. 753.—(b) 10 East, 100.

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in the course of that Term; that it was quite clear, that the defendant might have been rendered on the return day of the writ; and that it appeared that he had surrendered to the sheriff's officer on the 3rd of *November*, although he was not delivered over to the custody of the gaoler until the 5th. It was merely stated by the plaintiff's attorney at Chambers that the defendant was at large, which ought to have been verified on oath; but as no criminality could attach to the sheriff, although he ought to have come earlier, and as he had made a mere mistake in his return, they ordered the rule to be made absolute, upon payment of all costs as between attorney and client.

Rule absolute accordingly.

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LORD ELLIOTT, Vouchee.

Where, in the deed to lead the uses, the premises were described as a farm, in the parish of *L.*, late in the occupation of *J. H.*, and it was afterwards discovered that part of the farm was situate in the parish of *A.*, which was not mentioned in the deed; the Court refused

to allow the recovery to be amended by describing the farm as being situate in both parishes, although it was sworn that the whole of the farm was in the occupation of *J. H.*, that it was intended to pass, and that the premises had been since enjoyed consistently with the deed.

MR. Serjeant *Cross*, moved that this recovery, which was suffered in 1791, might be amended as to the local description of a farm, under the following circumstances. In the deed to make a tenant to the *præcipe*, the premises were described as a messuage and farm, consisting of one hundred and sixty-nine acres, two roods, and one perch, in the parish of *Lea*, in the county of *Wilts*, then or late in the occupation of *John Habgood*. On the sale of part of the farm by auction, in 1803, it appeared, that part of it, called *Ashton Meadows*, and consisting of seventy-eight acres, was situate in the parish of *Ashton Keys*, and that it had been improperly described in the deed and recovery as be-

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ing situate in the parish of *Lea*. The learned Serjeant produced an affidavit, stating that before and at the time of the conveyance, the whole of the farm was in the occupation of *Habgood*, and that it was intended to pass:—and a further affidavit was read, in which the identity of the parties and continuance of possession were satisfactorily accounted for. He submitted that the part of the farm situate in the parish of *Ashton Keys*, might be so described in the recovery, although it was omitted in the deed, and relied on the case of *Henzell*, demandant; *Lodge*, Tenant; *Lawson*, vouchee (a); where a recovery was amended by adding the name of a parish, although it was not inserted or mentioned in the deed to lead the uses, the premises being therein described as “all the vouchee’s lands in *Aldenham* or *elsewhere*, in the county of *Kent*, in the occupation of *Robert Goddard*,” and *Goddard* rented one entire farm of the vouchee, all of which it was sworn was intended to pass by the recovery, being principally in the parish of *Aldenham*, but part thereof lay in the parish of *Mersham*, which was not known to the parties at the time the recovery was suffered: the Court allowed the recovery to be amended by inserting the word *Mersham*. So, in *Kinderley*, demandant; *Domville*, tenant; Sir *C. W. Bampfylde*, vouchee (b); the Court allowed the name of a parish to be added, in which part of the premises lay, on its being sworn that the parish intended to be added was wholly within the same county. Here, it is quite clear, that the whole of the farm in question was intended to pass by the deed, as the number of acres was not only specifically enumerated, but the farm was described to be in the occupation of a particular tenant, as in the case of *Henzell v. Lodge*.

Lord Chief Justice GIFFORD. — In that case, the general

(a) 2 Sir W. Bl. 747. S. C. 3 Wils. 154. 2 Wms. Saund. 94 a, (a).

—(b) 1 Taunt. 257.

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words or *elsewhere* in the county of *Kent*, were inserted in the deed. Here, it is true that the number of acres might be sufficient to cover the property intended to be conveyed; but the case of *Kinderley*, demandant; *Domville*, tenant; *Sir C. Bampfylde*, vouchee (a), appears to me to be decisive against the present application. The Court there held, that a recovery could not be amended by inserting more parishes, unless it were irresistibly clear that the land in those parishes passed by the deed. There, too, the deed referred to a schedule annexed, in which the closes intended to be conveyed were specifically enumerated, and some of them were not situate in the parish in which they were described, but in two adjoining parishes; and although it was submitted, that it was not the ordinary case, where the description of the estate was circumscribed by the restrictive addition of the parish, and as the grantor had referred to the schedule thereunder written, which must be taken as if it had been incorporated in the body of the deed; yet the Court held, that the description was not sufficient to pass the whole estate, and that it was not enough, that it was doubtful, whether it would pass by the deed or not.—But it being afterwards discovered, that by the deed, the parties conveyed all the lands of which the vouchee was seised in the parishes enumerated, “or elsewhere in the county of *Devon*,” (within which all the premises were situated), the Court granted the amendment. That case is infinitely stronger than the present, as here the closes are not enumerated; but merely the aggregate quantity of acres of which the farm was described to consist. On the whole, therefore, I am of opinion that this amendment cannot be allowed.

Mr. Justice PARK, and Mr. Justice BURROUGH, concurring,

The application was refused.

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HARDING v. AUSTEN.
SAME v. SAME.

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Jan. 31st.

MR. Serjeant *Bosanquet* in the last Term obtained a rule *nisi* that the proceedings in these actions might be set aside, on an affidavit, which stated that the defendant had not authorized his attorney to defend them at the last assizes at *Bristol*, as he was not under terms to proceed to trial at such assizes. That they were accordingly treated as undefended causes, and that the plaintiff had in consequence obtained verdicts in both, but that the defendant verily believed he had a good defence. On the last day of that Term, the rule was enlarged, in consequence of the motions for new trials not having been proceeded in through the absence of the Lord Chief Justice and Mr. Justice *Richardson*, and by the terms of the enlarged rule the plaintiff was required to file his affidavits in answer to that of the defendant, a week before the present Term.

Affidavits, which were required by an enlarged rule to be filed a week before the commencement of the Term may, under circumstances, be used by leave of the Court, although they were not filed within the time specified in such rule.

Mr. Serjeant *Pell* having, on the 28th instant, obtained a rule *nisi*, that the plaintiff's affidavits might be considered as having been filed in due time, according to the terms of the rule, although in point of fact they had only been filed on the 22d, on an affidavit which stated that they had been prepared at *Bristol* on the 21st *November* last, and sent to the agent of the plaintiff's attorney in town, by whom they had been mistaid, together with the enlarged rule—

Mr. Serjeant *Bosanquet* now shewed cause, and submitted, that, as the rule of court required the plaintiff's affidavits to be filed a week before the commencement of the present Term, it should be strictly adhered to, and he refer-

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red to the case of *Cleesby v. Peese* (a), where, on a motion to set aside an award, the affidavit of the arbitrator was not filed within the time limited by the Court, they refused to allow its being read. So here, the plaintiff should have filed his affidavits within the time prescribed by the rule, and not having done so, he cannot be allowed to file them *nunc pro tunc*.

Mr. Serjeant *Pell*, in support of the rule, was stopped by the Court.

Lord Chief Justice GIFFORD:—It is true that the terms of a rule as prescribed by the Court should, in point of strictness, be attended to; but here it appears that the plaintiff's affidavits, in answer to that of the defendant, were prepared in the course of the last Term, and ready to be read by counsel, if the Court had then proceeded with the motions for new trials. On the last day of that Term the rule was enlarged as a matter of course. I therefore think, that, under the particular circumstances of this case, the plaintiff should not be precluded from using his affi-

(a) CLEESBY v. PEESE.

Where, on a motion to set aside an award, the affidavit of the arbitrator was not filed within the time limited by the Court, they refused to allow its being read.

THIS was an action against the defendant on a breach of contract for not accepting a quantity of oil. At the trial before Sir *James Mansfield*, at *Guildhall*, in the year 1812, the cause was referred to one of the special jurors, who afterwards made his award. On a motion to set it aside, on the ground that the arbitrator had expressed himself in a decisive manner in favor of one of the parties on a hearing before him; and the arbitrator prepared an affidavit to rebut that charge, and the motion was enlarged and the affidavit of the arbitrator was not filed in due time, according to a day prescribed by the Court for that purpose, and Mr. Serjeant *Vaughan* moved that it might be filed afterwards.—The Court refused the application on general principles, and observed, that it could not be done unless the cause of its not being filed was most fully and satisfactorily accounted for.

davits, although they were not filed within the time specified in the enlarged rule.

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Mr Justice PARK.—The rule that affidavits must be filed within a particular time as prescribed by the Court, is founded on principle and convenience. Here, however, as the business of the last Term was impeded by unforeseen and unavoidable circumstances, the rule in question was enlarged as a matter of course on the last day of that Term; and although a condition was imposed on the plaintiff to file his affidavits in answer to that of the defendant, a week before the commencement of the present, yet he may, under the circumstances, be considered as having filed them in due time; and more particularly so, as the defendant has not been taken by surprise, nor has he suffered any injustice or inconvenience by the delay.

Mr. Justice BURROUGH concurred.

Rule absolute (a).

(a) See *Hoar v. Hill*, 1 Chit. 27. *Tilley v. Henly*, Id. 136. Tidd's Practice, Vol. I. 7th edit. 522.

SAVAGE v. HALL.

Tuesday,
Feb. 3rd.

ON opposing the justification of bail in this cause by Mr. Serjeant *Pell*, it appeared, on the examination of one of them, that he resided at *Hadlow Street, Burton Crescent*; but he said that he merely lodged there; that he was in partnership with the other bail, and carried on business jointly with him as tea dealers, in *Tooley Street*; that his by his partner as a trader:—Held, that he might be considered a housekeeper, so as to be qualified to justify as bail.

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partner lived there; that he had no room in the house himself, but that the lower part of it was used as their shop and counting house; and that the rent and taxes were paid by them jointly. Under these circumstances, it was submitted, that he was not a housekeeper so as to be qualified to justify as bail.

But the Court referred to the case of *Hemming v. Plenty* (a), where a person was permitted to justify as bail, although he did not reside in the house in which he was described in the notice, which was kept jointly by himself and his partner, who carried on business therein as traders, the rent and taxes being paid by them jointly, and his partner only residing in the house; — the bail objected to, having a lodging at the distance of a mile and a half from it. And in *Saggers v. Gordon* (b), it was held, that the plaintiff might waive the qualification that the bail should be a housekeeper, and that in such case he might be permitted to justify on merely swearing as to the amount of his property.

The bail were accordingly allowed.

(a) 1 B. Moore, 529. — (b) 5 Taunt. 174.

Tuesday,
Feb. 3d.

COLES v. GUNN, arrested by the name of JAMES THOMAS GUNN, otherwise J. T. GUNN.

Where a defendant, whose name was John Thomas, had been arrested by the name of James Thomas, and signed a bail-bond with the initials J. T. — Held, that such signature was no waiver of the irregularity in the writ; and the court ordered the bail-bond to be set aside.

MR. Serjeant Vaughan, on a former day in this Term, obtained a rule calling on the plaintiff to shew cause, why the bail-bond which had been entered into for the defendant on his arrest in this action, might not be set aside or delivered up to be cancelled on his entering a common ap-

pearance; and why the plaintiff should not pay the defendant his costs occasioned by such arrest, together with the costs of this application. He founded his motion on an affidavit, which stated that the defendant was arrested on the 19th *January* last, at the suit of the plaintiff in this cause, on a *capias ad respondendum* issued out of this Court, in which he was described as *James Thomas Gunn*; and that on such arrest, he entered into a bail-bond with two sureties for his appearance at the return of the writ; that he was baptized by the name of *John Thomas Gunn*, and by that name had always been called and known, and not by the name of *James Thomas Gunn*, except in the present instance. And he relied on the case of *Taylor v. Rutherman* (a).

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Mr. Serjeant *Taddy* now shewed cause, on an affidavit which stated that the defendant had made no objection at the time of the arrest, but signed the bail-bond by his initials only, viz. *J. T. Gunn*; which the learned Serjeant submitted, might apply to the name of *John*, as well as *James*, and that such signature was consequently conclusive on the defendant.

But Mr. Justice PARK observed, that the case of *Taylor v. Rutherman*, was expressly in point, and that a party in custody under an arrest might be induced to put his signature to any instrument, in order to obtain his discharge; and consequently, that the defendant's signature of the bail-bond by his initials only, was no waiver of the irregularity in the writ. The rule was accordingly made

Absolute, but without costs (b).

(a) 6 Moore, 264. — (b) See *Reynolds v. Hankin*, 4 Barn. & Ald. 536.

1824.

Wednesday,
Feb. 4th.

HEATH v. HARRIS.

A notice of justification of bail for the 2nd of February, being a *dies non*, is irregular, as it ought to have been given for them to justify on the following day:—But the Court allowed time for the same bail to come up and justify, on another notice being given for that purpose.

NOTICE of justifying bail in this cause, having been given by the defendant's attorney, for *Monday* last, the 2nd instant, which was a *dies non*, the bail came up to justify yesterday morning; when the officer of the Court objected, that the notice could not be given for a *dies non*, but should have been for the following day.

Mr. Serjeant Cross now applied for further time to justify, and cited *Tidd's Practice* (a), where it is said, that "if the time allowed for justifying, expire on a day in Term, which happens to be *Midsummer-day*, or any other holiday when the Court does not sit, the notice of justification should be for the day they ought to justify, to prevent an assignment of the bail-bond; and the bail may justify the next day as a matter of course." Here, the notice of justification was served on *Friday*, the 30th of *January*, which would expire on the 2nd instant; and as the Court did not sit on that day, and as the bail on coming up yesterday were not opposed;—unless they were now allowed to justify, the plaintiff might take an assignment of the bail-bond, or perhaps might have already done so; and it appears that, according to the practice of the Court of *King's Bench*, where the time expires on a day in Term when the Court does not sit, the bail may justify on the following day.

But the Court observed, that the notice of justification for a *dies non* was bad, and that it ought to have been for the day following; but they allowed another notice to be given for to-morrow, when the same bail might come up

and justify; and they said, that if any proceedings had been taken on the bail-bond, an application might be made to stay them, on an affidavit of the above circumstances being made.

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HOLMES, Administrator of HOLMES, v. MURCOTT, a Prisoner.

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THE plaintiff's brother having obtained a verdict against the defendant in this cause for 51l. 14s. at the last Spring Assizes at *Warwick*, he shortly afterwards, viz. on the 11th April, 1823, surrendered himself to the *Fleet* prison, in discharge of his bail in the action; and within a few days after such surrender, gave the then plaintiff notice, that he intended to apply to the insolvent debtors' court for his discharge, under the insolvent debtors' act; 1 Geo. 4, c. 119, and he accordingly filed his petition and schedule in that court; and on such petition coming on to be heard, the Commissioners, on the 24th of June, adjudged him to be confined within the walls of the *Fleet* prison for eighteen months, at the suit of some one or more of his creditors, for fraudulently making away with his property. After such commitment, namely, on the 18th October last, the plaintiff's brother died intestate; and on an application being afterwards made by the defendant to Mr. Justice *Burrough* for his discharge, he gave time for letters of administration to be taken out to the late plaintiff's effects, which was accordingly done. But no further proceedings were taken against the defendant in this suit after the verdict which had been obtained against him. Nor was judgment entered up thereon either by the late plaintiff or the present, as his administrator, since his death.

Where the plaintiff having obtained a verdict against the defendant, he surrendered himself to prison in discharge of his bail, and gave notice to the plaintiff that he intended to apply for his discharge under the insolvent debtors' act, and that Court afterwards ordered that he should be imprisoned at the suit of some one or more of his creditors for fraud; and the plaintiff afterwards died intestate, and his brother took out letters of administration to his effects:—

Held, that the defendant was not entitled to be discharged, on the ground that the suit

had abated by the death of the original plaintiff, although no judgment had been signed or entered up either by him in his life-time, or his administrator since his death, as they were not bound to proceed further against the defendant, by virtue of the rule of Court, of *Michaelmas Term*, 3 Geo. 4.

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Mr. Serjeant *Vaughan*, on the first day of this Term, had obtained a rule *nisi* that the defendant might be discharged out of the custody of the warden as to the late plaintiff's suit in this action, on the ground that it had abated by his death, and as no judgment had been entered up against the defendant either previously to or since his decease. He submitted, that the insolvent debtors' court could not hold a prisoner in custody but at the suit of a creditor; and that the present action could not survive to the administrator of the late plaintiff, as no judgment had ever been signed or entered up; and consequently that there could not now be a plaintiff at whose suit the defendant could be kept in custody, in conformity to the provisions of the statute 1 Geo. 4, c. 119, ss. 16, 17, 18*. The

* By the 16th section it is enacted, that "the insolvent debtors' court shall forthwith, after a petition and schedule shall have been respectively filed, cause notice thereof to be given to the creditor or creditors at whose suit the prisoner shall be detained, and shall appoint a day and place for the hearing of the matter of such petition; when any creditor, having given notice of his intention, he and any other of the creditors may oppose the prisoner's discharge: and in case such prisoner shall not be opposed, and the Court shall be satisfied with the schedule, and that such prisoner is entitled to the benefit of the act, then, and in such case, the Court shall order such prisoner to be discharged from custody forthwith: or so soon as such prisoner shall have been in custody, at the suit of one or more of the persons who were creditors at the time of petitioning, or who have since become creditors in respect of debts then growing due, for such period, not exceeding six months in the whole, as the Court shall direct, to be computed from the time of filing the petition of such prisoner; and shall, in such order, specify the several debts of the said prisoner to which such discharge shall apply; and that such discharge shall extend (among other things) to all costs or expenses in any cause or proceeding in any Court, ecclesiastical or civil."

By the 17th section, it is enacted, that "when it shall appear to the Court that such prisoner shall have destroyed books, or acted fraudulently in discharging or concealing any debt, or fraudulently made away with or concealed any of his property, for the purpose of diminishing the sum to be divided among his creditors, or of

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rule of this Court, made in *Michaelmas* Term, 3 Geo. 4, for the purpose of preventing unnecessary expense to plaintiffs suing here, in cases of notices given by prisoners of their intention to apply for their discharge under any act made for the relief of insolvent debtors, and by which it was ordered, that "after such notice given to any plaintiff, no prisoner should be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of this Court, from the time of such notice given, until some rule or order should be made in the cause in that behalf by such Court, or one of the Judges thereof;" — applies only to the case of a prisoner who seeks to be superseded or discharged from an action pending at the suit of *the then existing* plaintiff. So, the order of the insolvent debtors' court, adjudging the defendant to be imprisoned at the suit of some one or more of his creditors, can only apply to a creditor in a suit then pending; and as the original plaintiff in this suit has died since its commencement, and no further steps have been taken against the defendant since the verdict was obtained against him,

giving an undue preference to any of them, it may be lawful for the Court to order that such prisoner shall not be discharged out of custody until he shall have been in custody *at the suit of some one or more of the persons who were creditors* at the time of his petitioning the Court, or had since become creditors in respect of debts then growing due; and from whose claims he should be discharged by the judgment of the Court; for such period, not exceeding three years in the whole, as the Court shall direct."

And by the 18th section, it is enacted, that "when prisoners shall have contracted debts fraudulently, or without having had any reasonable or probable expectation at the time when contracted of paying the same, or put any of his creditors to any unnecessary expense, the Court may order that such prisoner shall not be discharged out of custody as to any debt so contracted, &c. until he shall have been in custody at the suit of the creditor or creditors, *whose debts shall have been so contracted*, for such period not exceeding two years in the whole, as the Court shall direct."

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the suit must be considered to have abated, as in an ordinary case, and the defendant is accordingly entitled to his discharge.

Mr. Serjeant *Cross* now shewed cause, on an affidavit of the present plaintiff, which stated, that administration of the effects of his late brother had been duly granted to him: that the defendant, shortly after the adjudication of the insolvent debtors' court, applied for an allowance of four shillings per week, under the 19th section of the statute 1 Geo. 4, c. 119, and obtained an order for the weekly payment of 3s. 6d., which was regularly paid by the intestate during his life, and by the present plaintiff as his administrator since, and that he intended to continue such payments until the term of the defendant's imprisonment had expired. The learned Serjeant submitted, that although the plaintiff in the original suit had died since the verdict, and no further proceedings had been taken thereon as against the defendant, yet, that, as he was ordered to be detained in custody eighteen months, at the suit of some one or more of his creditors, by the adjudication of the insolvent debtors' court, this Court had no jurisdiction to order his discharge. But the application, if any, should have been made there. By the 17th section of the statute 1 Geo. 4, c. 119, it is enacted, that a prisoner who shall have been guilty of fraud, shall not be discharged out of custody, or be entitled to any protection under the act, until he shall have been in custody at the suit of some one or more of the persons who were creditors at the time of his petitioning the Court, or had since become creditors in respect of debts then growing due, and from whose claims he shall be discharged by the judgment of the Court, for any period not exceeding three years. The present plaintiff, therefore, as administrator, must be considered as a creditor, and entitled to detain the defendant under the terms of the order of the insolvent court. At all events, the rule of

this Court, made in *Michaelmas* Term, 3 *Geo.* 4, is decisive to show that the defendant, under the present circumstances, cannot be discharged by reason of the plaintiff's forbearing to proceed against him, until a rule or order be made in the cause by this Court, or one of the Judges thereof.

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Mr. Serjeant *Vaughan* in support of the rule submitted, that the intent and operation of the rule of *Michaelmas* Term, 3 *Geo.* 4, as to the discharge of a prisoner out of custody at the suit of *such* plaintiff, must be to confine it to the then plaintiff in the cause; and here, as no judgment was entered up, either previously to or since the death of the original plaintiff, there is no suit now pending against the defendant. The administrator should have taken out a *scire facias* to have entered up judgment, and as he has not done so, he is thereby guilty of *laches*. This Court, therefore, is empowered to discharge the defendant without interfering with the order of the insolvent debtors' court, by which he was sentenced to an imprisonment for fraud, at the suit of some one or more of his creditors.

Lord Chief Justice GIFFORD.—This is an application by the defendant, to be discharged out of the custody of the warden of the *Fleet* as to the late plaintiff's suit in this action, on the ground that he had died since the verdict, and that no judgment had been entered up thereon, either by him or the present plaintiff as his administrator. It appears that the defendant, shortly after the verdict had been obtained against him, gave a notice to the late plaintiff, and accordingly filed a schedule and petition for his discharge, under the statute 1 *Geo.* 4, c. 119; and that the insolvent debtors' court, on hearing such petition, ordered him to be imprisoned eighteen months for fraudulently making away with his property; at the suit of some one or more of his creditors. The defendant, by giving notice of his intention to apply for his discharge under that act, rendered

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it unnecessary for the then plaintiff to take any further proceedings against him, as the very object of the rule of *Michaelmas Term*, 3 *Geo.* 4, was to prevent unnecessary expense to plaintiffs suing in this Court, in cases of notices given them by prisoners of their intention to apply for their discharge under any of the insolvent acts; consequently, the intestate was not bound to proceed any further in the cause, until some rule or order of this Court, or one of its Judges, should have been made. After this notice, and the order of imprisonment by the insolvent debtors' court, the original plaintiff died, and administration was afterwards regularly taken out to his effects by the present plaintiff as his brother, and he thereby became one of the defendant's creditors. It has been contended, however, that this suit abated by the death of the original plaintiff; and perhaps, strictly speaking, it might be so. But the rule of this Court having rendered it unnecessary for the plaintiff or his representative to take any further step in the cause, until some order should be made in that behalf, it was unnecessary for the present plaintiff, as administrator, to put himself to the expense of causing judgment to be entered up. A party may be detained in custody under the statute 1 *Geo.* 4, c. 119, on mesne process, and it is unnecessary that the creditor detaining him, after notice given of his intention to apply for his discharge, should proceed to execution by the express terms of the rule or order of this Court.

Mr. Justice PARK.—I am of the same opinion. The express object of the rule of this Court, which was previously made a rule of the Court of *King's Bench*, was, to prevent the unnecessary expense attendant on plaintiffs, in proceeding to enter up judgment against their debtors, after notice had been given them by such debtors of their intention to apply for their discharge under the insolvent debtors' acts. The defendant in this case compelled the

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plaintiff to go on to trial, which he accordingly did, and obtained a verdict at the Spring Assizes, 1823; and the present plaintiff, as his administrator, was entitled to enter up judgment within two Terms after such verdict, under the statute 17 *Car.* 2, c. 8. He had, therefore, until the end of the last *Trinity* Term for that purpose, which expired on the 18th of *June*. The defendant had long previously given the intestate notice that he intended to apply for his discharge at the insolvent debtors' court. The rule of this Court attached immediately on such notice being given, and was not only made to prevent unnecessary expense to plaintiffs in such a case, but was founded on justice and good sense. The time for the defendant's discharge from his imprisonment by the order or adjudication of the insolvent debtors' court, has not yet expired. The proceedings, therefore, in that court, cannot be said to be at an end; and it appears to me to be clear, that the defendant is not entitled to be discharged on the present application; and more particularly so, as the proceeding to enter up judgment by the present plaintiff was suspended by the operation of the rule of this Court; and as he duly administered to the intestate's effects, he has not been guilty of laches, and consequently there is no substantial ground for this application.

Mr. Justice BURROUGH.—The defendant applied to me for his discharge at chambers, on the ground of the death of the original plaintiff in the suit; but under the circumstances, I thought administration should be taken out to his effects, and accordingly allowed time for that purpose. The very object of the rule of this Court was, that a plaintiff should not be put to the unnecessary expense of proceeding in a cause against a party who had given him notice of his intention to be discharged under the insolvent acts. The rule is imperative in its terms, and directs, that after such notice shall have been given, no prisoner shall be discharged by

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reason of such plaintiff's forbearing to proceed against him, without some order of the Court. The notice of the defendant's intention to apply for his discharge, was given to the plaintiff in his lifetime, and shortly after the verdict was obtained by him. The rule of Court immediately attached, and he was not bound to take any further proceedings without the direction of the Court. He afterwards died, and administration has since been duly taken out to his effects by the present plaintiff. He, therefore, as his administrator, now falls within the terms and spirit of the rule, and must be considered as placed in the same situation as his intestate, the original plaintiff, and who was not bound to take any further proceedings against the defendant in his lifetime.

Rule discharged.

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COOPER, Assignee of PATRICK KENIFECK, a Bankrupt, v.
 MACHIN and Another.

Depositions taken under a commission of bankruptcy, are not conclusive evidence of a petitioning creditor's debt, under the statute 49 Geo. 3, c. 121, s. 10. Therefore, in an action by the assignee, where such debt was founded on a bill of exchange drawn by the bankrupt, and accepted

THIS was an action of trover, brought by the plaintiff as assignee of *Patrick Kenifeck*, a bankrupt, to recover from the defendants certain articles of household furniture, alleged to have been the property of the bankrupt, and sold by him to the defendants on the 8th *February*, 1821, being about six weeks previously to the issuing of the commission, and subsequently to the committal of an act of bankruptcy. The defendants pleaded the general issue.

At the trial before Mr. Justice *Burrough*, at *Westminster*, at the sittings after the last *Trinity* Term, the defendants gave no notice of their intention to dispute the validity of the commission, or any of the proceedings un-

accepted previously to the issuing of the commission, and payable to the petitioning creditor, but his deposition in support of such debt did not state that the bill had been dishonoured by the drawee, or notice thereof given to the bankrupt as drawer:—Held, that it was not of itself sufficient evidence to establish a petitioning creditor's debt.

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der it. The plaintiff, in order to prove the petitioning creditor's debt, trading, and act of bankruptcy, put in the depositions taken before the commissioners, and on which the commission was founded. The first was, that of the plaintiff, and sworn on the 23d March, 1821, and which stated that the bankrupt, before and at the time of suing forth the commission, and then was indebted to the plaintiff in the sum of 400*l.* and upwards, as the drawer of a certain bill of exchange, for 597*l.* 10*s.* 1*d.*, dated 9th December, 1820, drawn by the bankrupt upon, and accepted by, one *William Keniseek*, and payable three months after date to the plaintiff; and which said bill of exchange became due at a day then passed, *namely*, on the 12th March, 1821, and was still unpaid; and that the consideration for the said bill was bona sold and delivered by the plaintiff to the bankrupt on the 9th December, 1820. There were other depositions stating that the bankrupt was a trader, and that he committed an act of bankruptcy on the 28d January, 1821, by absconding from *London* to *Calais*, with a view to delay his creditors and avoid an arrest. No evidence, however, was given to shew that the bill had been dishonoured by the acceptor *William Keniseek* when it became due, or that the bankrupt as drawer had ever received notice of such dishonour.—It was then objected for the defendants, that as these facts were necessary to be proved, and as they did not appear on the face of the plaintiff's deposition, there was not sufficient evidence to support the petitioning creditor's debt. The plaintiff then attempted to prove the dishonour and notice by parol, and also to shew that the bill was an accommodation bill, and accepted without consideration; but having failed to do so, and the learned Judge considering that it was necessary for the plaintiff to prove that the bankrupt, as the drawer, had due notice of the dishonour of the bill by the acceptor, directed a nonsuit, reserving leave to the plaintiff to move to set it aside, and have a verdict entered for him in-

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stead thereof, or a new trial granted, in case the Court should be of opinion that he was entitled to recover, or that the evidence adduced by him at the trial was sufficient to support the petitioning creditor's debt.

Mr. Serjeant *Vaughan* in the last Term, accordingly, obtained a rule *nisi*, and submitted, that as the defendants had given no notice to dispute any of the proceedings under the commission, as provided by the statute 49 *Geo. 3*, c. 121, s. 10 (a), such proceedings must be considered as sufficient evidence of the petitioning creditor's debt, as well as of the trading and act of bankruptcy. Although the depositions taken before the commissioners might not be conclusive, they are still *prima facie* evidence of those facts; and there can be no doubt but that if they are materially defective, they may be supplied by parol or other evidence. Here, however, the deposition made by the plaintiff as to the nature of the petitioning creditor's debt, was not only sufficient, but strictly conformable to the depositions usually made in cases of this nature, as it alleged distinctly that the bankrupt was indebted to him. The notice of the dishonour of the bill to the drawer could not have been required, as he had absconded before it became due. It was, therefore, sufficient for the plaintiff to produce the bill at the trial, and his deposition was conclusive to shew, that it was over-due and unpaid.

(a) By which it is enacted, that from and after the passing of that act, in all actions brought by or against assignees, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action, shall, if defendant, at or before the time of his pleading to such action, and if plaintiff, before issue joined in such action, give notice in writing to such assignee that he intends to dispute such matters, or any of them.

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Mr. Serjeant *Pell* now shewed cause. Although, by the statute 49 *Geo.* 3, c. 121, s. 10, it is provided that in all actions by or against assignees, the proceedings of the commissioners under a commission shall be received as evidence of the petitioning creditor's debt, unless notice shall be given to such assignees of an intention to dispute it, yet the only object of that section was to avoid the expense of adducing evidence in support of the commission, or calling witnesses to prove the same facts as are contained in the depositions taken before the commissioners: and the legislature merely intended to make such depositions *prima facie* admissible, to the extent of the facts therein contained, or which on the face of them they appeared to attest; but whether or not the facts so attested would constitute a good petitioning creditor's debt is still open to enquiry, and no more effect can be given to them than if such facts had been attempted to be proved at the trial by *vivâ voce* testimony or ordinary evidence. If this be so, it is quite clear that the facts contained in the plaintiff's deposition, are not sufficient to constitute a legal or valid petitioning creditor's debt against the bankrupt, as the drawer of the bill; for in order to have made him liable as such, he should have had due notice of its dishonour by the acceptor, and it should have been stated that he became liable in consequence thereof. Here, however, it did not appear on the face of the deposition, nor was it proved at the trial, that the bankrupt had any notice of the dishonour, or even that the bill had been presented to the acceptor for payment, or that it had been dishonoured by him when it became due. Although an affidavit of debt by the holder as against the drawer of a bill of exchange, might be sufficient for the preliminary purpose of an arrest, by stating that the latter was indebted to the former on a bill drawn by him, and which then remained unpaid; yet, it is not sufficient to entitle the holder to a verdict in

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an action on the bill; for, at the trial, he must be prepared to prove all collateral facts as against the drawer, which are necessary to establish his liability, viz. that the acceptor had dishonoured the bill, and that due notice of such dishonour had been given to the drawer. Although the deficiency in the deposition was attempted to be remedied by proving these facts by parol, yet the plaintiff altogether failed in so doing. And even if the bill had been drawn without consideration, that fact could not be given in evidence to supply the defect in the plaintiff's deposition.

Mr. Serjeant *Vaughan* in support of the rule, insisted, that there were sufficient facts disclosed on the face of the plaintiff's deposition to found a petitioning creditor's debt, as against the bankrupt as the drawer of the bill, as it was stated that the consideration for which it was given, was hops sold and delivered by the plaintiff to the bankrupt on the day the bill was drawn, and which is of itself sufficient evidence of a petitioning creditor's debt; or at all events, it was enough for the plaintiff to allege that the bankrupt was indebted to him as the drawer of such bill; and as the deposition is express and distinct as to that fact, it must be implied either that the latter had due notice of its dishonour; or that such notice had been dispensed with. The express object of the statute was, to avoid the necessity of extrinsic evidence in actions brought by or against assignees, and to make depositions and other proceedings under the commission sufficient evidence of a petitioning creditor's debt. If the drawer of a bill absconds, to avoid or delay his creditors previously to its arriving at maturity, it is not necessary to give him notice of dishonour by the acceptor; and here it was positively sworn, that the bankrupt had left this country for *France*, to avoid being arrested, two months before the bill became due. In *Ex parte*

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Douthat (a), where *A.* having drawn a bill of exchange for 148*l.* in favor of *B.* to whom he was previously indebted to that amount, committed an act of bankruptcy before the bill became due or had been presented for acceptance: it was held, that such bill was a good petitioning creditor's debt, although it appeared that it had been duly presented and paid by the acceptor, subsequently to the issuing of the commission. [Mr. Justice Park.—In that case the bill had not been presented for acceptance before the act of bankruptcy was committed; if it had been and refused, the drawer would have been liable immediately: but where a bill has been accepted and a bankruptcy afterwards intervenes, can a commission be issued against the drawer without shewing that the bill had been presented to the acceptor, and that he had refused to pay, or, in other terms, that the bill had been dishonoured by him?] Notice of the dishonour of a bill cannot be necessary where the drawer has previously become a bankrupt; and here, as he had absconded before it became due, such notice was consequently dispensed with; and as no notice was given by the defendants to dispute any of the proceedings under the commission, the depositions before the commissioners were sufficient evidence to support it, as well as the petitioning creditor's debt and act of bankruptcy committed by the bankrupt previously to the bill's becoming due.

Lord Chief Justice GIFFORD.—This was an application to set aside a nonsuit in an action of trover brought by the plaintiff as assignee of a bankrupt, in order to try the validity of a commission which had been issued against the latter. No notice was given by the defendants of any intention by them to dispute the petitioning creditor's debt, or any of the proceedings under the commission; and

(a) 4 Barn. & Ald. 67.

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consequently, such proceedings were receivable as evidence of such debt, under the 10th section of the statute 49 Geo. 3, c. 121. Although, however, such proceedings have been made evidence under that section, and the assignee was not bound to go into further or extrinsic proof as to the nature of the petitioning creditor's debt, or the trading and act of bankruptcy, yet such proceedings are not of themselves sufficient to support an action circumstanced as the present, unless enough appears upon the face of them to shew clearly that there was a good petitioning creditor's debt, and an act of bankruptcy committed, so as to dispense with the necessity of evidence *aliunde*. Although the deposition of the petitioning creditor himself may be received as evidence of his debt, *Bisse v. Randall* (a), yet it must appear upon the face of such deposition, that it was a good and valid debt; and the statute does not preclude an assignee from resorting to the ordinary mode of evidence, provided the proceedings under the commission shall turn out to be defective. What then are the facts in this case? The petitioning creditor's debt on which the commission was founded, was stated to arise on a bill of exchange, dated the 9th of December, 1820, drawn by the bankrupt upon, and accepted by one *William Keniseck*, and payable to the plaintiff. It is unnecessary to comment or remark on the case of *Ex parte Douthat*, as the decision there turned on the construction of the statutes 7 Geo. 1, c. 31; and 5 Geo. 2, c. 30; and the question was, whether the holder of a bill payable at a future day, could sue out a commission on it before it arrived at maturity. Where, however, a bill is due, and a debt is constituted thereon as against the drawer, through the default of the acceptor, it is always necessary, independently of the statute 49 Geo. 3, in order to raise such debt, to prove that the bill was presented to the acceptor, and dishonoured by him, and that the drawer had due notice of such dishonour. Here, the

(a) 2 Camp. 493.

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commission was dated and sued out, not only after the bill was accepted, but after it became due, *namely*, on the 20th March, 1821. But there is not a syllable in the deposition by the plaintiff to shew that it was dishonoured, or even that it was presented to the acceptor for payment, or that the drawer, against whom the action was brought, had any notice of such dishonour. Without a statement of these facts, it appears to me, that the deposition is not of itself sufficient evidence of a petitioning creditor's debt. Although such a general allegation as is therein contained, might have been sufficient in an affidavit to hold a party to bail, as that is merely a preliminary proceeding; yet, in order to constitute a debt to support a commission against a bankrupt, the same facts must be proved as would be requisite to support an action against a solvent defendant, before the statute 49 Geo. 3, was passed, or such as might have been necessary to have been proved, in case the proceedings under the commission had been disputed: and it appears to me to be quite clear, that there is no evidence to that effect on the plaintiff's deposition as adduced at the trial. Although the deficiency was attempted to be supplied by parol testimony, still it did not tend to assist the plaintiff's case or carry it further. Even if the acceptor himself had been called, and declared that there had been no consideration as between him and the drawer, it would not dispense with the presentment of the bill to him for payment when it became due. So, although the drawer had previously absconded, it does not follow but that the acceptor might have paid the bill on its being duly presented to him for that purpose. Even that circumstance, therefore, does not waive the necessity of the presentment of the bill to him, as the drawer could only be liable on his default. For these reasons, I am of opinion, that the depositions in this case are insufficient, and not conclusive evidence of the petitioning creditor's debt.

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Mr. Justice PARK.—The only difficulty I have felt in this case is, that we cannot be cognizant of all the proceedings that took place before the commissioners under the commission, and before whom the deposition as to the nature of the petitioning creditor's debt was made. If, previously to the passing of the statute 49 Geo. 3, the assignee had sued for a debt due to him from the bankrupt, as the drawer of a bill of exchange, it would not have been sufficient for him to prove the bankrupt's handwriting as the drawer, and that he was a trader, and as such had committed an act of bankruptcy:—but he must have gone further, and proved presentment to and dishonour of the bill by the acceptor, and that due notice of such dishonour had been given to the drawer. Although the deposition in question may be such as is usually made before the commissioners in cases of this description, and might be available in support of a commission, yet it is not of itself sufficient to enable the plaintiff to sustain this action, as it merely states, that the bankrupt was indebted to him in a certain sum, as the drawer of a bill of exchange then overdue and unpaid. Where the validity of a commission is disputed, the petitioning creditor's debt must be fully and satisfactorily established and proved; and, I have frequently known parties nonsuited by Lord *Ellenborough*, because there was no sufficient act of bankruptcy set out on the face of the proceedings, which took place before the commissioners. The legislature, in passing the statute 49 Geo. 3, never intended that the depositions of parties taken before the commissioners, should, under all circumstances, be conclusive evidence of a petitioning creditor's debt, but merely that they should be receivable as *prima facie* evidence, to prove such facts as they appeared to attest upon the face of them; still, however, they do not preclude the party from resorting to *viva voce* testimony, or other ordinary evidence, and unless it were intended by

the statute to exclude all other evidence besides such depositions, which it evidently was not, it appears to me, that the petitioning creditor's debt in this case has not been established. It is quite clear that the acceptor himself might have been called, or his declarations might have been admissible to shew the circumstances under which he accepted the bill, but the plaintiff altogether failed in proving that fact, or that the drawer had any notice of its dishonour.

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Mr. Justice BURROUGH. — I decided this case at *Nisi Prius* on the words, and what appeared to me to be the meaning of the statute, by which the legislature could never have intended, that proceedings under a commission should be made conclusive evidence of all the facts necessary to constitute a bankruptcy. There can be no doubt but that they meant that further evidence might be received, to prove either of the facts required to constitute such bankruptcy. The proceedings under the commission were merely to be taken in lieu of parol testimony, which may be received in case the depositions taken before the commissioners are not sufficient to answer the purpose of proving a petitioning creditor's debt or act of bankruptcy. As no sufficient evidence of such debt appears on the face of the plaintiff's deposition in this case, or was established by any additional or parol proof, the plaintiff was not entitled to recover. This rule therefore must be

Discharged (a).

(a) In *Humphries v. Coggan*, 1 Rose's Bankruptcy Cases, 226, where notice had not been given pursuant to the 49 Geo. 3, c. 121, s. 10, Sir James Mansfield held the commission and proceedings under the bankruptcy to be conclusive evidence of the trading, petitioning creditor's debt and act of bankruptcy, and refused to admit evidence to disprove such debt as it stood on the face of the proceedings. But in the subsequent case of *Ellis v. Shirley*, 3 Camp. 424; Lord Ellenborough held, that such

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proceedings were only *prima facie* evidence, but not conclusive; and evidence was admitted to disprove the petitioning creditor's debt as stated in the deposition on which the plaintiff was declared bankrupt. And in *Brown v. Forrestall*, Holt, N. P. C. 190, Lord Chief Justice *Gibbs* held, that although the proceedings under a commission were admissible evidence, still that the Court was to form a judgment upon them, whether they proved an act of bankruptcy or not. And in the late case of *Rasson v. Haigh*, 1 Carr. & Payne's N. P. C. 79, Lord Chief Justice *Gifford* observed, "that it was often supposed, that when no notice was given of disputing the act of bankruptcy, it was intended to be admitted; but the truth was, that the only difference made by the statute was, that the depositions were made evidence where there was no notice to dispute; but that, upon the depositions, as good an act of bankruptcy must be shewn as if there was notice, and witnesses called to prove the act of bankruptcy."

Thursday,
 Feb. 5th.

Inf. 433.

LADY SALTOUN and Others, Executrix and Executors, v.
 HOUSTOUN and Others, Executrix and Executors.

In order to
 create or con-
 stitute a cove-
 nant in a deed,

THIS was an action of covenant, brought by the Right Honourable Lady Saltoun, the Honourable Sir John Bay-
 it is not necessary that the word "covenant" should be expressly introduced:—Where, therefore, by a deed entered into between A. B. of the first, C. D. of the second, and E. F. of the third part, after reciting that A. B. had for several years carried on business as a general merchant, and that it had been agreed that he should retire from business, and that C. D. and E. F. should become partners therein for ten years, to be computed from the day of the date of the deed; that the capital of the co-partnership should consist of 36,000*l.*, 24,000*l.* of which should be advanced by A. B. for C. D., and 12,000*l.* was to be advanced by E. F. as his proportion, the deed proceeded to state, that "whereas an account of all the debts and credits of A. B. in his business as a merchant had been that day taken, and the balance in his favor amounted to 38,033*l.*; and whereas it had been agreed by and between A. B., C. D. and E. F., that the whole of the debts and credits of A. B. should be received and paid by C. D. and E. F., and that the balance of 38,033*l.* should be accounted for and paid by them in manner thereafter mentioned; and that for the better enabling them to collect and receive such credits, A. B. by indenture had assigned the same to them:—The indenture further witnessed, that "it was thereby agreed, that in consideration of 12,000*l.* paid to A. B. by E. F. as his share of the capital, and for raising 24,000*l.* as C. D.'s share of such capital, the sum of 36,000*l.* part of the 38,033*l.* was to be retained by C. D. and E. F. as their capital or joint stock, and the remaining 2033*l.* paid by them to A. B. by instalments, at 6, 12, 18, and 24 months without interest, and that if any of the debts should prove bad, the loss should be borne by C. D. and E. F. —Held, that this deed amounted to a covenant by them to pay the debts due from A. B. in his business on the day of the date of the indenture; although it was contended that there might have been a separate and independent parol agreement for the payment of such debts.

ley, and *Kenneth Mackenzie*, surviving executrix and executors of *Simon Fraser*, Esq. the elder, deceased, against *Elizabeth Houstoun*, *Benjamin Shaw*, and *Stephen Nicholson Barber*, executrix and executors of *James Henry Houstoun*, deceased, who survived *Simon Fraser* the younger. The first count of the declaration stated, that on the 29th April, 1808, by a certain indenture made between the said *Simon Fraser*, Esq. (the plaintiffs' testator), in his life-time, of the first part; the Honourable *Simon Fraser* in his life-time, (since deceased), one of the grandsons of the said first named *Simon Fraser*, of the second part; and the said *James Henry Houstoun* (the defendants' testator), in his life-time, of the third part; reciting, that the said *Simon Fraser* the grandfather, had for several years then passed, carried on the business of a general merchant, and that it had lately been agreed between the said *Simon Fraser* the grandfather, *Simon Fraser* the grandson, and *James Henry Houstoun*, that the said *Simon Fraser* the grandfather, should retire from the said business, and that the said *Simon Fraser* the grandson and *James Henry Houstoun*, should become co-partners therein upon the terms thereafter mentioned: it was by the said indenture witnessed, that for effectuating the said agreement, and in consideration of the mutual trust and confidence which the said *Simon Fraser* the grandson, and *James Henry Houstoun*, had and reposed in each other, each of them, the said *Simon Fraser* the grandson, and *James Henry Houstoun*, for himself, his heirs, executors and administrators, did covenant, promise and agree to and with the other of them, his executors and administrators, mutually, by the said indenture in manner following, that is to say, that they, the said *Simon Fraser* the grandson and *James Henry Houstoun*, would become and remain co-partners and joint traders as general merchants for the term of ten years, to commence and be computed from the day of the date of the said indenture:—and it was in and by the said indenture, amongst other things, further recited, that an ac-

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count of all the debts and credits of the said *Simon Fraser* the grandfather, in his said trade or business of a general merchant had been that day taken, and that the balance in favor of the said *Simon Fraser* the grandfather, then amounted to the sum of 38,033*l.* 3*s.* 5*d.* And the said *Simon Fraser* the grandson, and *James Henry Houstoun*, did thereby agree to and with the said *Simon Fraser* the grandfather, amongst other things, in manner following, that is to say, that the whole of the said debts and credits of the said *Simon Fraser* the grandfather, should be received and paid by them the said *Simon Fraser* the grandson, and *James Henry Houstoun*.—The plaintiffs then averred, that upon the account so taken, the debts of *Simon Fraser* the grandfather in his said trade or business on the 29th April, 1808, amounted to 20,000*l.*, and assigned for breach, that *Simon Fraser* the grandson, and *James Henry Houstoun* in their respective life-times, and the said *James Henry Houstoun* in his life-time, after the death of the said *Simon Fraser* the grandson, and whom the said *James Henry Houstoun* survived, and the said defendants, executrix and executors as aforesaid, since the death of the said *James Henry Houstoun*, had not, nor had any or either of them paid or caused to be paid the debts of the said *Simon Fraser* the grandfather, so due and owing by him in his said trade or business of a general merchant on the said 29th April, 1808, but wholly refused and neglected so to do; and that by reason thereof, the plaintiffs as such surviving executrix and executors as aforesaid, had since the death of the said *James Henry Houstoun*, been called on, and obliged to pay, and actually had paid in satisfaction and discharge of the said debts of the said *Simon Fraser* the grandfather, so due and owing by him as aforesaid, the sum of 10,061*l.* 15*s.* 3*d.*

The second count, after reciting and setting out the indenture as in the first, proceeded to set out another indenture of the same date, made between *Simon Fraser* the grand-

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father of the one part, and the said *Simon Fraser* the grandson, and *James Henry Houstoun* of the other part; whereby *Simon Fraser* the grandfather, bargained, sold, assigned, transferred and set over unto the said *Simon Fraser* the grandson, and *James Henry Houstoun*, all and every the debts and sums of money due and owing to *Simon Fraser* the grandfather, and which were mentioned and specified in a schedule or inventory thereunder written:—To have and to hold the same unto the said *Simon Fraser* the grandson, and *James Henry Houstoun*, their executors, administrators, and assigns for ever; and for the better effectuating the purposes of that deed, *Simon Fraser* the grandfather, appointed the said *Simon Fraser* the grandson, and *James Henry Houstoun*, to demand and sue for all debts and sums due and owing to him and intended to be thereby assigned, and to give receipts for the same, and that the said *Simon Fraser* the grandfather, had full power to sell, assign, and set over the said debts, &c. to the said *Simon Fraser* the grandson, and the said *James Henry Houstoun*.—The plaintiffs then averred, that there were no deeds, instruments or writings between the aforesaid parties, in regard to the matters in the said indentures in that count mentioned, or in regard to the said debts and credits, save and except the said two indentures, and that they contained the whole of the agreement between the said parties relative to the debts and credits of *Simon Fraser* the grandfather, and that his debts at the date of the said indentures amounted to 80,000*l.*, and assigned a breach precisely in the same terms as in the first count. There was a third count, in which both the indentures were set out in more general terms, and in which the plaintiffs averred, that these were the only instruments or writings in regard to the matters therein contained, or the debts and credits therein mentioned, without stating that they contained the whole of the agreement between the parties relative to the said debts and credits.

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The defendants in their plea craved oyer of the indenture in the first count mentioned, which on being set out, after reciting as in the first count was recited, *namely*, that it had been then lately agreed between *Simon Fraser* the grandfather, *Simon Fraser* the grandson, and *James Henry Houstoun*, that the grandfather should retire from the business, and that the grandson and *Houstoun* should become co-partners therein, for the term therein mentioned, proceeded to state as follows, *viz.* "that the capital of the said co-partnership should consist of the principal sum of 36,000*l.*, of which, the sum of 24,000*l.* should be advanced in manner thereafter mentioned by the said *Simon Fraser* the grandfather, as the proportion of the said *Simon Fraser* the grandson, and the sum of 12,000*l.* should be advanced by the said *James Henry Houstoun* in manner thereafter mentioned as his proportion, and that the whole of the capital of the said co-partnership should remain in the said business, and that neither of the said co-partners should at any time during the term of the said co-partnership, be at liberty to draw any part thereof." "And, whereas an account of all the debts and credits of the said *Simon Fraser* the grandfather in his said trade or business of a general merchant as aforesaid hath been this day taken, and the balance in favour of the said *Simon Fraser* the grandfather, amounts to the sum of 38,033*l.* 3*s.* 5*d.*:—and whereas it has been agreed by and between the said *Simon Fraser* the grandfather, and *Simon Fraser* the grandson, and *James Henry Houstoun*, that the whole of the said debts and credits of the said *Simon Fraser* the grandfather, shall be received and paid by the said *Simon Fraser* the grandson, and *James Henry Houstoun*; and that the said balance of 38,033*l.* 3*s.* 5*d.*, shall be accounted for and paid by them in manner hereinafter mentioned; and for the better enabling them to call in, collect, and receive such credits, the said *Simon Fraser* the grandfather, in and by a certain indenture of assignment, bearing even date with

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the now reciting indenture, hath assigned the same unto the said *Simon Fraser* the grandson, and *James Henry Houstoun*;—Now, this indenture further witnesseth, that it is hereby agreed by and between the said *Simon Fraser* the grandfather, *Simon Fraser* the grandson, and *James Henry Houstoun*, that in consideration of the sum of 12,000*l.* unto him the said *Simon Fraser* the grandfather in hand paid by the said *James Henry Houstoun*, as and for his share of the capital of the said joint trade or business, and for raising the sum of 24,000*l.* the proportion of the said *Simon Fraser* the grandson, of such capital, the sum of 36,000*l.* part of the said sum of 38,033*l.* 3*s.* 5*d.*, the balance of the debts and credits of the said *Simon Fraser* the grandfather, shall be retained and kept by them the said *Simon Fraser* the grandson, and *James Henry Houstoun*, as and for the capital or joint stock of them the said *Simon Fraser* the grandson, and *James Henry Houstoun*, and shall belong to them in the following proportions, that is to say, the sum of 24,000*l.* part thereof to the said *Simon Fraser* the grandson, and the sum of 12,000*l.* the residue thereof, to the said *James Henry Houstoun*: And it is also further agreed by and between the said *Simon Fraser* the grandfather, *Simon Fraser* the grandson, and *James Henry Houstoun*, that the sum of 2033*l.* 3*s.* 5*d.* being the remainder of the balance of the debts and credits of the said *Simon Fraser* the grandfather, shall be paid by them the said *Simon Fraser* the grandson, and *James Henry Houstoun*, unto the said *Simon Fraser* the grandfather, his executors, administrators, or assigns by equal instalments, at the end or expiration of 6, 12, 18, and 24 months, from the day of the date of the now reciting indenture, but without any interest for the same: And it is hereby further agreed and declared between the said parties hereto, that in case any of the debts so assigned to them the said *Simon Fraser* the grandson, and *James Henry Houstoun*, by the said *Simon Fraser* the grand-

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father, shall hereafter prove bad and not recoverable, the loss shall be borne by the said *Simon Fraser* the grandson, and *James Henry Houstoun*: And it is hereby agreed between the said co-partners, that the said joint trade or business shall be carried on under the name and firm of "The Honourable *Simon Fraser* and Company," and that each of them the said *Simon Fraser* the grandson, and *James Henry Houstoun*, and their respective executors and administrators, shall during the said co-partnership, and at the determination thereof, have and enjoy a several share and right, title and interest, of, in and to the said joint stock, and all profits arising therefrom in the proportions following, (that is to say), the said *Simon Fraser* the grandson, in and to two-third parts thereof, and the said *James Henry Houstoun*, in and to the one-third part thereof, and shall, and may accordingly, upon, or at the end of the said co-partnership, receive and take his and their respective parts, shares, and proportions of the said joint stock and profits to his and their own use, without benefit of survivorship. The deed then contained a number of covenants or stipulations as to the terms of co-partnership between *Simon Fraser* the grandson, and *James Henry Houstoun*, and the mode in which their concerns should be conducted; but there was nothing further which related to the said *Simon Fraser* the grandfather, or was at all material to the present question.—The defendants then craved oyer of the indenture in the second and last counts mentioned, which on being set out, they demurred generally to the whole declaration, and the plaintiffs joined in demurrer.

The cause now came on for argument, when Mr. Serjeant *Taddy* in support of the demurrer, submitted, that the question was, whether the recital of the agreement in the deed of the 29th of April, 1808, by *Simon Fraser* the grandson, and *Houstoun*, to pay the debts of *Simon Fraser* the

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grandfather, amounted to a covenant on their parts to pay such debts, so as to bind the executors of *Houstoun*? It must be admitted, that any form of words or mode of expression in a deed, which clearly evinces an agreement, will amount to a covenant, and it is not important in what part of a deed such covenant is to be found, nor are any technical or precise words necessary, but the whole of the instrument must be looked at in order to arrive at the intention of the parties; and if such intent be apparent, whereby they bind themselves to do a given thing, or perform a certain act in any part of the instrument, it is sufficient to constitute a covenant. Here, however, it is manifest, that it never was intended that *Houstoun* should be individually liable to pay the debts of *Simon Fraser* the grandfather, not only from the language of the deed itself, but from the relative situation of the parties; for it would be absurd to suppose that *Houstoun*, who was only to be interested in one-third of the capital of the partnership concern, should subject himself to the payment of all the debts contracted by *Fraser* the grandfather on his retiring, and previously to the commencement of the co-partnership between him and the grandson. As then, there was no intention of *Houstoun's* so doing, has he done it by the terms or language of the deed? It is quite clear, that taking the whole of that instrument together, he has not. The deed contains no stipulation to make him liable for the payment of the debts, nor is there any time specified within which they are to be paid, nor can any expression be found, from which it can be inferred that he has rendered himself liable to such an extent. The plaintiffs must take it for granted, that the balance in favor of the grandfather would amount to 38,000*l*. But *Houstoun* having only purchased a third part of that balance, he and the grandson were to be interested in different proportions; and yet it must be contended, that they are equally liable to pay all the debts of the grandfather, due before

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the commencement of the partnership. It is true, they might be compelled in equity to apply the credits in discharge of such debts, but there is no covenant which binds them to pay at all events, or out of their individual funds, nor was it intended that they should take any such risk upon themselves. It certainly cannot be inferred, that *Houstoun* was to make himself responsible for the whole of the debts of the grandfather, when, for any thing that appears to the contrary, there might not have been any credits of his to be received. Supposing, therefore, that the credits turned out to be unproductive, can it be imagined for a moment, that *Houstoun* was to be made liable to pay all the debts, besides making the advances of 12,000*l.* and subject himself to the further payment of 2033*l.*, and, yet to have nothing in return for those sums? The *substratum* of the deed is founded on the recitals therein contained, and which refer to a time past, *namely*, that it *had been* lately agreed that the grandfather should retire and the grandson and *Houstoun* become partners on certain terms, and that it *had been* agreed, that the whole of the debts and credits of the grandfather should be received and paid by them. This, it must be observed, is not only in the past tense, but by way of recital; and it is perfectly consistent with the language of the deed and the declaration founded thereon, that the debts of the grandfather might have been paid under the provisions of a parol and separate agreement previously entered into, and although it is averred in the second count, that the indentures therein set out, contain the whole of the agreement between the parties; still, that must be taken to refer merely to the agreement therein contained, *viz.* as to the covenant for the payment of the 2033*l.* as the remainder of the balance. The previous recitals, therefore, cannot be available for the purpose of raising a covenant on which the present action can be supported, nor was it ever intended that they should, as the debts of the grandfather might have been previously paid

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under the provisions of a parol and separate agreement. The mere recital of a debt in a deed under hand and seal, will not make it a specialty debt; for in the case of *Lacon v. Mertins (a)*, Lord *Hardwicke* is reported to have said, "the recital of a debt under hand and seal, has been held to be no specialty debt, although recited in a deed; for it must stand on its own force." Although, however, it may be said, that it may be collected from the recitals, that *Houstoun* was to pay the debts of the grandfather, yet it was not provided in any part of the deed that he should do so, nor was there any mode or time specified for his so doing, and for any thing that appears to the contrary, there might have been a previous and separate agreement for the payment of such debts, and if so, the recital on which the present action is founded cannot constitute a covenant, or be considered as tantamount to it. The covenant in the deed as to the payment of the remainder of the balance was direct and positive, and it must be taken for granted, that such balance only existed, at the time the deed was executed. So, the bad debts were to be borne by the grandson and *Houstoun* by way of a diminution of the capital, according to their several proportions, *namely*, the one as to two-thirds, and the other as to the remaining one-third. The grandfather by the terms of the deed could never be called on to pay any debts previously contracted by him, and where words do not amount to an agreement by *both parties*, covenant cannot be maintained, nor is it any where provided by the deed that *Houstoun*, or the grandson, should pay such debts, and although much stress may be laid on the words that the whole of the debts and credits of the grandfather shall be received and paid, yet it will not constitute a covenant. In *Geary v. Read (b)*, it was held, that if there are articles of agreement made by indenture, between *A.*

(a) 1 Vea. 319. S. C. not S. P. 3 Atk. 1. — (b) 1 Roll's Abr. 518.
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and *B.*, in which *A.* agrees that *B.* shall have a house in a street in *London*, for certain years, provided, and upon condition, that *B.* shall receive and pay the rents of the other houses of *A.* in the same street mentioned in a schedule annexed to the indenture; and it is further agreed, that *B.* for his labour in the collection of the said rent, shall have the overplus of the rents over and above such a certain sum;—this is not a covenant on the part of *B.* to bind him to receive and pay the rents mentioned in the schedule. That is an extremely strong case, as the house was demised to the defendant, on the condition that he should collect and pay the rents of the lessor's other houses; and it was yet held that it was not a covenant, but merely a condition annexed to the estate, which determined it by the lessor's not collecting and paying the rent. In the *Earl of Mountague v. Lord Bath*, Lord Chief Justice *Holt* said (a), that “the reciting part of a deed is not at all a necessary part, either in law or equity:—that it may be made use of to explain a doubt of the intention and meaning of the parties, but that it has no effect or operation:—but that when it comes to limit an estate, there the deed is to have its effect according to such limitations as are therein set forth.” So here, the deed can only be taken to have effect to the extent of the allegations therein contained, and although the second count of the declaration alleges that there were no deeds, instruments, or writings between the parties, except the two indentures in that count mentioned, and that they contained the whole of the agreement between them relative to the debts of *Fraser* the grandfather, yet it does not negative the presumption that there might have been another previous agreement between the parties. Such an allegation therefore, is bad in substance, or, at all events, is a mere allegation of fact, attempting to explain the recitals in the previous part of the former deed, which was set

(a) 3 Chan. Cas. 101.

out in the first count of the declaration, and on which the present action was founded. It therefore follows on the whole, that it was not the intention of the parties, nor can it be collected from any part of that deed, that *Houstoun* made himself liable to the extent of all the debts of *Fraser* the grandfather previously to his becoming a partner with his grandson, or that the plaintiffs, as surviving executrix or executors of the grandfather, can be considered as specialty creditors of *Houstoun*, by virtue of the indenture of the 29th April, 1806, as set out in part in the first count of the declaration.

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Mr. Serjeant *Doyly*, *contra*. The only question in this case is, whether the recital of the agreement in the commencement of the deed, and for the breach of which the present action is brought, amounts to a covenant or not. That it amounts to an agreement between the parties is apparent on the face of the instrument, and it is equally clear that they intended to bind themselves by it; and although it has been said, that they might have a remedy in equity, still no distinction can be drawn as to the force, validity, or operation of an agreement in that Court or in a Court of common law, although there may be some distinction as to the mode in which it may be enforced: and it is expressly alleged in the second count of the declaration, that there were no deeds, instruments, or writings between the parties, in regard to the debts and credits of *Fraser*, the grandfather, save and except the two indentures in that count mentioned, and that they contained the whole of the agreement between the parties relative to such debts and credits. It is therefore clear, that no other deed or instrument in writing, relating to the receipt or payment of such debts, existed at the time those deeds were executed; for that averment has been admitted by the demurrer, and it must, therefore, be taken as a matter of fact, that there were none, as it distinctly negatives that such ever existed. A mere

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verbal agreement, therefore, would be of no avail, and could not be enforced, as it did not appear that there had been any, with the exception of that expressed on the face of the indenture; and there is no other written instrument in existence relative to the receipt and payment of the debts of *Fraser* the grandfather. The nature of the agreement in the recital is the very essence of a covenant, and operates as an express agreement between the parties, deriving its validity and force from an indenture under their hands and seals, and which must, therefore, be considered as a covenant in point of law. It has been admitted, that it is immaterial in what part of an indenture a covenant is to be found, nor are any technical words or particular form of expression necessary, by which a covenant is to be formed. The Courts, in creating covenants, have always endeavoured to collect the true intention of the parties from the whole of the deed taken together, and have, at different times gone great lengths in extracting and eliciting them from different parts of a deed, which at first sight might not appear to bear that construction, and even probably where the parties themselves did not, at the time, intend to subject themselves to an action of covenant. Some words indeed import and make a covenant in law, although there be not any express covenant: as, if a man by deed demise land for years, and the lessee is ousted, covenant lies on the word *demisi*. So, if he demise or assign by the word "*concessi*," covenant may be maintained. Both these words are in the past tense, and are therefore applicable to that part of the argument for the defendants, in which it has been submitted, that the part of the deed from which it is sought to charge them, refers to a time past; and consequently, that it could not be considered as forming part of the agreement at the time the indenture was executed. That instrument however, does not contain a mere implied, but an express or absolute agreement or covenant. Still, it has been contended, that because there are covenants in the present tense

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in the concluding part of the indenture, the recital of an agreement in the past is not to be taken as a covenant, so as to be available for the purposes of the present action. But in the case of *Deering v. Farrington* (a), where, in an action of covenant on a deed, by which the defendant assigned and transferred all the money he should be allowed to receive by any order of a foreign state to come to him in lieu of his share in a ship; on its being objected that covenant would not lie, as it was neither an express nor implied covenant, and that an assignment transferring, when it cannot transfer, signifies nothing; yet Lord Chief Justice Hale said, "it is a covenant, and then it is all one as if the defendant had covenanted that the plaintiff should have all the money that the defendant should recover for his loss in such a ship." In *Russell v. Gulwell* (b), where, in an action of debt on bond, it appeared, that the plaintiff by deed indented, had leased to the defendant a farm called D., except one close by name, and the lessee by the same indenture covenanted with the lessor to do certain things concerning the premises, and was bound in the bond to perform all the covenants and agreements in the said indenture; and the question was, whether the word *premises* should extend to the excepted close:—although it was resolved that it should not; yet it was there agreed, that if one make a lease of lands, reserving a right of way, or common, or any other profit *a prender*; if the lessee disturb him in the enjoyment of the way, &c. covenant will lie for such disturbance:—and it was also agreed that the exception was an agreement of the lessee, that the land excepted should not pass by the demise; but that it was not any agreement that he should not occupy; and that sometimes an exception was an agreement that should charge the lessee, where he had an interest in the thing excepted. That case, therefore, shews, that even an excep-

(a) 1 Mod. 113.—(b) Cro. Eliz. 657.

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tion may in some instances constitute a covenant. In *Pomfret v. Ricraft* (a), where a lease was made of a house and piece of land, except the land on which a pump stood, with the use of the pump:—it was held, that the lessee might repair the pump, but that no action of covenant would lie against the lessor for not repairing it; and the Court there put the case, that if a man grants a water-course by deed, and the grantor stops it, the grantee shall have an action of covenant against him: and that if a lease be made of a house and estovers, and the lessor destroy all the wood out of which the estovers were to be taken, the lessee shall have an action of covenant against the lessor; for these are wilful acts of the lessor or grantor, and it is a misfeasance in him to annul or avoid his own grant. In *Pordage v. Cole* (b), where it was agreed between A. and B. by deed, that B. should pay A. a sum of money for his lands, on a particular day; it was held, that these words amounted to a covenant by A. to convey the lands to B. on that day, for that the word “agreed” was the word of both: that it was an independent covenant; and the Court adjudged that the action was well brought, without an averment of the conveyance of the land; because it should be intended that both parties had sealed the specialty, and that if the plaintiff had not conveyed the land to the defendant, he had also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounted to a covenant on the part of the plaintiff to convey the land; and so that each party had a mutual remedy against the other. In the Year Book (c), it is said by Fitzherbert, “if I sell my land to you for so much money as J. S. shall name, and I sell the land to another before J. S. has named the price, this sale shall be good; for although he afterwards name a certain sum to be paid by the first vendee, yet he shall not have the land, but he is put to his action of covenant.” This differs

(a) 1 Wms. Saund. 321.—(b) *Id.* 319.—(c) 14 Hen. 8, fol. 15.

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from the above cases, where the object of the deed was to convey the land, as something remained to be done under an agreement which arose out of it. In *Brice v. Carre (a)*, where an action of covenant was brought on a deed executed by the defendant's testator, whereby he acknowledged himself to be accountable for all such monies as should be charged by the plaintiff on *A.* to be paid to *B.*, and alleged that the plaintiff charged a certain sum of money on *A.* to be paid to *B.*, and that he had not paid it, and it was objected that covenant would not lie, but that the proper form of action was an action of account; yet the Court said that covenant well laid; and that so it would on any words in a deed, purporting to be an agreement for the payment of money. If covenant will lie on such an agreement, *a fortiori*, it may be maintained in the present instance, where the intent of the parties may be clearly collected on the face of the deed, by which *Houstoun* and the grandson agreed to pay the debts of the grandfather. In the case of *Lonsdale v. Lumley (b)*, which was tried before Mr. Justice *Rooke*, in the Court of *Pleas* at *Durham*, at the Summer Assizes, 1795, a question arose between two partners, and there was an agreement entered into by them as to the terms on which the partnership was to be dissolved, and which were as follows;—*A.* was to offer *B.* a certain sum, and he was to take time to consider, and if he was not willing to receive that sum for his share of the partnership accounts, the party who made the offer was to be compelled to take it. The agreement went on to state, that if it should appear that any balance was due from either of the partners on the partnership account, such balance was to be considered as the proper debt of and due from such partner as should be deemed the purchaser under the terms of the agreement. The plaintiff was the

(a) 1 Lev. 47.—(b) MS.

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purchaser, and the sum he claimed was found to be due to him from the defendant on the partnership account, on which the plaintiff brought an action of *assumpsit* for that sum under the terms of the agreement, and on its being objected that the action should have been covenant, because in the deed it was agreed that the balance due should be considered as the debt of the partner who should so purchase; yet that learned Judge overruled the objection, and held, that the plaintiff might recover in *assumpsit*. A motion was afterwards made for a new trial, and the point being argued before Mr. Justice *Rooke* and Mr. Justice *Lawrence*, they held that the action was misconceived, as it ought to have been an action of covenant, and a nonsuit was accordingly directed to be entered. In *Seddon v. Senute* (a), where the proprietor of a medicine, by indenture, assigned all his interest in it to *B*, reserving one-third of the profits, and covenanted that he would not thereafter prepare or sell it, and *B*. by another indenture assigned all his interest in the medicine to *C*. subject to the covenant of reservation; and the proprietor afterwards by a third indenture, reciting the original indenture, sold his reserved right to *C*., and all other his right, title, and interest in the medicine:—it was held, that an implied covenant between the vendor and *C*. was thereby raised, that the former would not make or vend it; on the ground, that there appeared a manifest intention of the one party to sell the whole of his interest in the making and vending of the medicine, and of the other to purchase the whole interest in it, and that he afterwards disturbed him in the enjoyment of it by making and selling it on his own account. So, here, the retiring party meant that on the in-coming partners receiving the whole of the credits, they should be answerable for the payment of all debts due by him at the time of the execution of the deed under

(a) 13 East, 63.

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which the new partnership was formed and stipulated to be carried on. In the late case of the Duke of *St. Albans v. Ellis* (a), where the lessee covenanted that he would at all times during the term, plough, sow, manure, and cultivate the demised premises in a due course of husbandry, (except the rabbit-warren and sheep-walk) and a breach was assigned for ploughing and sowing the rabbit-warren and sheep-walk:—it was held, that he was liable as upon an implied covenant, that the parts so excepted should not be ploughed at all; and Lord *Ellenborough* said (b), “by whatever words we can collect an agreement that the thing should not be done, we collect enough to make an action of covenant maintainable for the doing of it, and that it was no answer that the lessee ploughed in a due course of husbandry that which he was bound by his covenant not to have ploughed at all.” That case is an express authority to shew, that even an exception in a lease may form an implied covenant arising out of such exception.—The result to be drawn from all these cases is, that wherever a deed contains an agreement by the parties to bind themselves, whether by proviso, or even by way of exception, and which is to be collected from the whole of the instrument in which such agreement is contained, it is sufficient to constitute a covenant on which an action can be maintained. The cases which have been cited for the defendants, do not appear to bear on the present point. In *Geary v. Reade*, the question was, whether the words inserted in the indenture by way of proviso constituted a covenant, and they were held to be merely a condition or limitation annexed to the lease. *Lacon v. Mertins* only decided that the recital of a debt under seal in an indenture would not constitute a specialty debt, and it is quite clear that every recital in a deed will not amount to a covenant. In the case of an arrangement with creditors, an

(a) 16 East, 352.

(b) *Id.* 355.

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indenture specifying debts under different heads, viz. some as simple contract, and others as specialty debts, and making provision for them accordingly, will not subject the latter to such a denomination. The case of the Earl of Mountague v. Lord Bath, turned merely on the effect of a miarecital between a deed and a will.—With respect to the argument, that there is no express covenant to render *Houstoun* liable in the language of the deed, as the recital refers to a time past, or to a separate parol agreement, supposing the recital to have gone on and stated, that whereas it had been agreed *and that such agreement now continues*, could there be any doubt of its not amounting to a covenant? and taking the whole of the deed together, it must be considered as if the latter words had been introduced; for there is but one continuing agreement on the face of it; and it must be so taken either by a jury *in pais*, or by a Court of law, for it is merely stated that it *hath been agreed*, and there is nothing whatever to negative that it is not a continuing agreement, and it having been acknowledged to be so under the hands and seals of the parties, it constitutes a covenant; and more particularly so, as there is nothing to shew that it was at an end, or by which the parties themselves did not intend to be thereafter bound. The rules of pleading are now more strict and rigorous than those applied to the construction of deeds; and for this obvious reason, that, in pleading, parties are opposed to each other, and are ready to take advantage of any slip that may occur; whilst, in indentures containing covenants, there is a greater degree of unanimity, and a more liberal construction given to words and sentences; and it is obvious that some of the most important and material averments in pleading come under a recital by the introduction of the word “whereas,” with the exception of the action of trespass. In *assumpsit*, nearly all the material averments in a declaration are introduced by way of recital, and it would be difficult to assign any substantial reason why it should

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not be introduced in a deed, which is founded on an agreement between the parties. There are a number of decisions in which it has been expressly determined, that a recital may constitute a covenant. In *Severn v. Clarke (a)*, where A. by deed poll recited that "*whereas he was*" possessed of certain lands for years of a certain term by good and lawful conveyance: he assigned the same to J. S. with diverse covenants, articles, and agreements in the said deed contained, which are, or ought to be performed on his part; it was held, that as the recital was joined to the rest of the deed, it amounted to an agreement or undertaking that he was possessed, and that it was material, for that against this recital he could not say that he had not any thing in the term. In *Graves v. White (b)*, there was a treaty of marriage between the plaintiff and the defendant's daughter in law, and the articles in the recital stated, that whereas the defendant was to pay the plaintiff 1000*l.* for the wife's marriage portion, the plaintiff covenanted to settle certain lands, &c. the Court held, that an action of covenant would lie upon this recital. In *Hollis v. Carr (c)*, where an action was brought for a marriage portion according to articles of agreement entered into between the parties previously to marriage, which concluded by reciting that "*whereas it is intended to levy a fine;*" it was held, that upon the whole frame of the articles there was a covenant to levy a fine, for that wherever there is an agreement under hand and seal, covenant lies. That case is infinitely stronger than the present, as it depended entirely upon a recital, which, although it expressed an intention only that a fine should be levied, was yet held to be obligatory on the parties. So a recital of an agreement in the beginning of a deed will create a covenant on which an action may be maintained; for in *Barfoot v.*

(a) 1 Leon. 122.—(b) 2 Eq. Cas. Abr. Tit. Portions, C. 1, S. C. 2 Freem. 57.—(c) 2 Mod. 86.

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Freewell (a), where, on the demise of a coal mine, it was recited, that before the sealing of the indenture, it was agreed that the plaintiff should have the third part of the coals dug; on covenant being brought, it was objected, that there was no covenant to pay the third part, but only a recital of an agreement to have it; but Lord Chief Justice *Hale* held, that, "were it but a recital, that before the indenture they were agreed, it is a covenant: and so to say, whereas it was agreed to pay 20*l*., for now the indenture itself confirms the agreement and intent precedent, though it be relative to the former act *in pais*; for when it is declared by deed, it is then a covenant by the indenture." There the agreement was quite collateral to the main object or intention of the indenture, and it did not appear that the plaintiff was a party to it, and although it was merely a recital, it was still held to amount to a covenant. Here, however, the intention of the parties, as it is to be collected from the subject matter of the indenture, expressly shews and strengthens the presumption, that the arrangements between them were to be considered as one entire transaction, and under which the partnership should be constituted and carried on. It is also evident that it was intended that *Houstoun* should be responsible for the payment of the debts of *Fraser* the elder, as no reason whatever can be adduced why the latter should assign all his credits to him and his grandson, who were to carry on the concern, unless they were to give him an equivalent by discharging his debts. It is a well known principle of law, that whatever agreements may be entered into by parties pending a negotiation, if, before it be completed, they be reduced into writing, and a deed is accordingly framed thereon, that whatever may be omitted is not obligatory on them, unless it be stated in the instrument, as otherwise it would interfere with that general rule of evi-

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dence, that where an agreement has once been reduced into writing, parol evidence of it cannot be received. The leading case in support of this doctrine is *Menes v. Ansall* (a), where it was held, that parol evidence could not be admitted to contradict an agreement in writing, or even to explain it, unless there were a latent ambiguity. In *Mayer v. Baertli* (b), where, upon a sale of goods, the seller produced a sample, and represented that the bulk was of equal quality, and there was a sale-note, which did not refer to the sample, it was held not to be a sale by sample; and Lord *Ellenborough* there said, that when the sale-note was silent as to the sample, he could not permit it to be incorporated into the contract, as it would amount to an admission of parol evidence to contradict a written document. So, in *Gardiner v. Gray* (c), where, at the time of sale, a specimen of the goods was exhibited to the buyer, it was held that if there were a written contract which merely described the goods as of a particular denomination, it was not a sale by sample; and Lord *Ellenborough* said, that "the written contract containing no such stipulation, he could not allow it to be superadded by parol testimony." And in the late case of *Kain v. Old*, Lord Chief Justice *Abbott* lays down the rule as applicable to this point, in the following terms, (d) "where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, although not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But, if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract." Applying that principle to the present case, it is quite clear, that before the deed in question was executed, the parties fully considered on what

(a) 3 Wils. 275. — (b) 4 Camp. 22. — (c) 4 Camp. 144.

(d) 2 Barn. & Cress. 634.

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terms the partnership was to be carried on, as well as those by which the grandfather was to retire. They are expressed on the face of the deed, and form a part of it; and although it has been said that it could not be binding on *Houstoun*, to the extent contended for by the plaintiffs, as he was only interested to the amount of one-third in the partnership concern; and therefore, that he could not be answerable to the payment of the whole of the debts of the grandfather; still the whole object of the deed was to regulate and arrange all the transactions between the two in-coming partners, as well as to provide for the party retiring; and it is an established principle, that if a partner be only interested in, or entitled to a small share of a partnership, he is liable to bear the charges of the concern with all the other partners, and to the full extent of his property. On the whole, therefore, it appears by the previous part of the deed of *April*, 1808, that the accounts of the grandfather had been investigated; that the whole of the debts and credits were to be received and paid by the two in-coming partners, and that the balance which far exceeded the debts, should be accounted for and paid by them according to the stipulations in the deed, and by which they undertook to pay the debts of the party retiring, in consideration of their receiving his credits, all of which were assigned to them by the deed; and as the defendant *Houstoun* has not paid the debts according to his engagement, it is quite clear that the plaintiffs, as representatives of *Fraser* the grandfather, are entitled to recover.

Mr. Serjeant *Taddy* in reply. The cases which have been cited and relied on for the plaintiffs, will not impugna or entrench on the principle on which the present question must be decided, as they cannot be considered as bearing upon or being immediately applicable to it. In *Hollis v. Carr*, the Court considered that, from the whole form and context of the deed, it was intended to be a covenant; and it must

be admitted, that when it can be collected that it is the express object of a deed to provide for a particular act being done, it is immaterial in what part of it such an object can be found. So, in *Graves v. White*, it was found that the object of the deed was for the defendant to give the plaintiff 1000*l.* on a certain event taking place. In *Severn v. Clark*, there can be no doubt but that the recital formed part of the instrument itself, for taking them both together, it was the express object of the deed to secure a certain interest growing out of the estate. The Duke of *St. Albans v. Ellis*, merely goes the length of shewing that a covenant may be founded on an exception in a lease; and the case of *Pomfret v. Ricroft* established the same principle, provided such exception related to the object of the deed. So, in *Seddon v. Senate*, where a person conveyed his interest in a medicine with a provision respecting a part of the profits, it was held that there was an implied covenant on his part, that he should not afterwards sell it. With respect to the word *demisi* having been held to amount to a covenant, it may be considered in the present as well as in the past tense, as it is equivalent to saying that every circumstance being known to the lessor, he agrees to demise to the lessee on certain terms and reservations contained in the lease. In *Pordage v. Cole*, it was expressly agreed that a specific sum should be given for land on a certain day; that, therefore, amounted to a covenant, although not formally expressed. *Barfoot v. Freswell*, cannot be considered as an authority, and must be contrary to law, as it appears to have been an action of covenant brought by the plaintiff who was no party to the deed. With respect to *Lonsdale v. Lumley*, it appears that by the terms of the agreement as to the mode by which the partnership was dissolved, it was expressed, that the balance was to be considered as the proper debt of the purchaser; that, therefore, could only have been done by deed, and consequently, could not be made the subject

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of an action of *assumpsit*. In *Brice v. Carr*, although there are no words which expressly purport to be a covenant, yet, as the object of the deed was, that the party should be liable for the payment of money, it was held that covenant might be maintained. Here, however, it does not appear from any of the recitals, that the object of the deed was for *Houstoun* and his partner to provide for the debts of the grandfather individually and personally, nor do any of such recitals go to the regulation of the partnership between them, nor can they be connected with the subsequent parts of the deed, so as to constitute a part of one and the same transaction. The debts and credits of the grandfather might not be confined to the mercantile trade or business which he had formerly carried on, and there is nothing on the face of the instrument declared on to shew, that there might not have been a separate and independent agreement, and even an agreement by parol would satisfy the terms of the recitals, as they formed no operative part of the deed; and the case of *Lacon v. Mertins*, is decisive to shew that a recital in a deed may be used for the purpose of explaining a doubt, but has no express or definite operation as to the subject matter of the deed itself.

Lord Chief Justice GIFFORD. — This is an action of covenant brought by the executrix and executors of *Simon Fraser the elder*, against the representatives of *James Henry Houstoun*. The declaration, after setting out an indenture between *Simon Fraser, Esq.* of the first, the Honourable *Simon Fraser*, grandson of the first named *Simon Fraser*, of the second, and *James Henry Houstoun*, of the third part, (all of which parties are now deceased), states a covenant by which *Simon Fraser the grandson*, and *James Henry Houstoun*, did for themselves, their executors and administrators, covenant, promise and agree to and with the said *Simon Fraser the grandfather*, amongst other

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things in manner following, that is to say, that the whole of the debts and credits of the said *Simon Fraser* the grandfather, should be received and paid by them, the said *Simon Fraser* the grandson, and *James Henry Houstoun*; and assigned for breach, that neither they in their respective life-times, nor the defendants as their representatives since, had paid the debts of *Simon Fraser* the grandfather. The second count varies from the first only by setting out a deed of assignment, by which *Simon Fraser* the grandfather assigned all debts due to him to *Simon Fraser* the grandson and *James Henry Houstoun*. There is also a third count, which varies but little from the two former. To this declaration, the defendants having craved oyer of both indentures, (the whole of which were set out), demurred generally, and the plaintiffs joined in demurrer; and the question for the opinion of the Court now is, whether, from the whole of the instrument as first set out, and on which the present action is founded, it can be collected that there was a covenant entered into on the part of *Simon Fraser* the grandson, and *James Henry Houstoun*, as alleged in the declaration, and with which they are charged? It has been admitted, in the course of the argument, that it is not necessary, in order to constitute a covenant, the word covenant should occur or be expressly made use of in the deed. It is sufficient if it appears from the whole of the instrument, or can in terms be collected, that there is an intention of the parties that such a covenant shall exist, and if it were necessary to refer to authorities in support of so clear a position, I need only mention *Stevinson's case* (a), where, in an action of debt on bond, the condition was, that whereas the plaintiff had covenanted with the defendant that it should be lawful for the defendant to cut down wood for fire-bote, and hedge-bote, without making any waste or cutting more than was necessary;" and the breach as-

(a) 1 Leon. 324. 12 East, 182 n.

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signed was, that the defendant had committed waste in felling wood, &c. and the condition of the bond was to perform all covenants and agreements, and exception was taken, because the condition ought only to extend to covenants to be performed on the part of the lessee;—yet the exception was not allowed, as it appeared from the whole of the instrument that it was the *agreement* of the lessee, although it was the covenant of the lessor. There are several other cases in which the same doctrine has been laid down; and particular in *Hollis v. Carr* (a), where Lord Chancellor *Finch* said, “there are many cases where words will make a covenant because of the agreement, when the general words of ‘covenant,’ ‘grant,’ &c. are wanting, as ‘yielding and paying’ will make a covenant.” There, in articles of agreement reciting an intended marriage, it was covenanted that, in consideration of the lady’s portion, a jointure should be settled on her, and the conclusion was in these words, “and it is hereby agreed, that a fine shall be levied to secure the payment of the said portion,” and it was held, that these words created a covenant to levy a fine, for that wherever there is an agreement under hand and seal, covenants lie. In order therefore to come to a direct decision on the present question, we must look with the greatest accuracy at the instrument before us, to ascertain distinctly the nature of the real contract between the parties, as well as the intention and object they had in view. It appears that the business of a general merchant had been carried on to a considerable extent by *Simon Fraser* the grandfather, and the deed in question was entered into by him, of the first part, The Honourable *Simon Fraser* his grandson, of the second, and *James Henry Houstoun*, of the third part; and in which it is recited that the grandfather had for several years past carried on the business of a general merchant, and that it was agreed between him, the grandson, and

(a) 2 Mod. 92.

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Houstoun, that the former should retire, and that the two latter should carry on the business as co-partners, for the space of ten years, to commence and be computed from the day of the date of the deed, and that the capital of the said co-partnership should consist of the principal sum of 36,000*l.*; of which 24,000*l.* was to be advanced by the grandfather, as the proportion of *Simon Fraser* the grandson; and the sum of 12,000*l.* was to be advanced by *James Henry Houstoun* as his proportion:—and it was agreed that the whole of the capital of the co-partnership should remain in the said business, and that neither of the co-partners should at any time during the term of the co-partnership, be at liberty to draw any part or portion thereof.—Then comes that part of the deed on which the present question arises, and which is as follows:—“ And *whereas* an account of all the debts and credits of *Simon Fraser* the grandfather, in his business of a general merchant, hath been this day taken, and the balance in his favour amounts to the sum of 38,033*l.* 3*s.* 5*d.*:—(that sum, therefore, was admitted to be the balance due to him, on a supposition that all the debts and credits were good), “ *and whereas* it hath been agreed by and between *Simon Fraser* the grandfather, *Simon Fraser* the grandson, and *James Henry Houstoun*, that the whole of the said debts and credits of the said *Simon Fraser* the grandfather, shall be received and paid by *Simon Fraser* the grandson and *James Henry Houstoun*, and that the balance of 38,033*l.* 3*s.* 5*d.* shall be accounted for and paid by them in manner hereinafter mentioned; and that for the better enabling them to call in, collect, and receive such credits, the said *Simon Fraser* the grandfather, by an indenture of assignment, bearing even date with the then reciting indenture, assigned the same to *Simon Fraser* the grandson, and *Houstoun*.” This deed of assignment is set out in the second count of the declaration, and appears to be a deed of transfer from *Fraser* the grandfather to *Fraser* the grandson and *James Henry Houstoun*, of all debts

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due to *Fraser*, the grandfather; and there is also a power contained therein, constituting them his attornies, and enabling them to recover such debts.—The indenture on which the present question arises, then witnessed, “that it was thereby agreed by and between *Simon Fraser* the grandfather, *Simon Fraser* the grandson, and *James Henry Houstoun*, that in consideration of the sum of 12,000*l.* unto him *Simon Fraser* the grandfather, in hand paid by *James Henry Houstoun*, as his share of the capital, and for raising 24,000*l.*, the proportion of *Simon Fraser* the grandson, of such capital, the sum of 36,000*l.* part of the sum of 88,088*l.* 3*s.* 5*d.* the balance of the debts and credits of *Simon Fraser* the grandfather, should be retained and kept by them, *Simon Fraser* the grandson, and *James Henry Houstoun*, as their capital or joint stock, and should belong to them in the following proportions, (that is to say), 24,000*l.* part thereof, to *Simon Fraser* the grandson, and 12,000*l.* the residue thereof, to *James Henry Houstoun*; and it was also further agreed between *Simon Fraser* the grandfather, *Simon Fraser* the grandson, and *James Henry Houstoun*, that 2033*l.* 3*s.* 5*d.* being the remainder of the balance of the debts and credits of *Simon Fraser* the grandfather, should be paid by *Simon Fraser* the grandson, and *James Henry Houstoun*, unto *Simon Fraser* the grandfather, his executors, administrators, or assigns, by equal instalments at the end of 6, 12, 18, and 24 months from the date of the said indenture, but without interest; and it was thereby further agreed and declared between the parties thereto, that in case any of the debts so assigned to *Simon Fraser* the grandson, and *James Henry Houstoun*, by *Simon Fraser* the grandfather, should thereafter prove bad and not recoverable, the loss should be borne by *Simon Fraser* the grandson, and *James Henry Houstoun*.—The deed then contains a variety of provisions, which do not bear on the present question, as they relate to the manner in which the business was to be carried on as between the two in-coming partners.

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—Now, what was the object which the parties had in view at the time of executing this instrument? It appears clearly to be this, that *Fraser* the grandfather, who was about to retire from business, was willing to relinquish it to his grandson and *Houstoun*, without any compensation whatever; and, for that purpose, an account was taken of all the debts and credits, and, on a balance being struck, it was found that the sum of 38,000*l.* was due and belonging to him. He therefore, in effect, assigned to his grandson and *Houstoun* the whole of this business or concern, on their taking the credits and bearing the burden of the debts, and accounting to him for the whole, in the manner pointed out by the deed, and by which *Houstoun* was to advance 12,000*l.* towards the capital to be employed in carrying on the business; and 24,000*l.*, out of the balance due to the grandfather, was to remain in the concern as the portion of the grandson, or as his share of the capital of the co-partnership, and the balance of 2033*l.* 3*s.* 5*d.* was to be paid to the grandfather by certain instalments: and as many of the credits might turn out to be unproductive, there is an express provision, that the loss, (if any), should fall on the two in-coming partners, that is, that it should come into the general account of the trade, as if the grandfather had not retired, and that such balance should be accounted for and paid to him. It is not at all unreasonable, that after the grandfather had assigned all the credits of the concern to them; or the funds from which they were to be paid, that they should take on themselves the discharge and payment of all the debts he then owed. But whether it were unreasonable or not, does not appear to be material to the present question, as they took it upon themselves to do so by an express provision, and not under a mere recital, as it has been contended for on the part of the defendants. What is this supposed recital? It has been said, that it is a recital, because it begins by the word “whereas;” but it is expressly stated in the deed, that “it has been

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agreed between the grandfather, the grandson, and *Houstoun*; that the whole of the debts and credits of the former should be received and paid by the two latter:" and there is an express agreement or covenant by them to pay the grandfather the balance of 2033*l.* 3*s.* 5*d.* This, therefore, clearly amounts to a covenant, that they shall receive the credits on the one hand, and pay the debts on the other. It has been ingeniously argued for the defendants, that although it may be true that this might operate as an agreement, yet that it is a mere recital of a separate parol agreement, or, in other terms, that it is a recital of an agreement not contained in this instrument; and that although it might perhaps furnish evidence in support of an action of *assumpsit*, or evidence of a separate contract, according to the terms of which it had been previously agreed that the debts should be paid, yet that it does not amount to any stipulation by which *Houstoun* rendered himself liable to the payment of the debts of *Fraser* the grandfather, under this deed. But it is expressly stated therein, that the whole of the debts and credits shall be received and paid. The Court, however, must look at the whole of the instrument taken collectively, in order to ascertain the intention of the parties, and if they find it contains a clear agreement to do a certain act, in whatever terms that agreement is expressed, whether by recital, provision, exception, or otherwise, still, it is clear that an action of covenant may be maintained. Here, therefore, on looking at the whole of the deed, considering its terms and provisions, the nature of the subject matter, as well as the relative situations of the parties, and the purport of the contract between them, I am of opinion, that taking the recitals as connected with the body of the deed, there is sufficient to amount to a covenant by the in-coming partners to pay the debts and credits of *Fraser* the grandfather at the time of his retiring, as stated in the declaration; and, consequently, that the plaintiffs are entitled to recover.

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Mr. Justice PARK.—After the very luminous exposition of this deed by my Lord Chief Justice, it would be an idle waste of time for me to add much on the subject. It has been agreed in the course of the argument, that where the intention of the parties is clear, a covenant may be collected from any part of a deed, and that it is not necessary that the word “covenant” should be contained therein, and that wherever there is an agreement under hand and seal, an action of covenant may be maintained. There can be no doubt but that it was the intention of the parties when the deed was entered into, that *Simon Fraser* the grandson and *James Henry Houstoun* should pay the debts of *Simon Fraser* the grandfather. The words in that instrument are, “and whereas an account of all the debts and credits of *Simon Fraser* the grandfather, in his said trade or business of a general merchant, hath been this day taken;” (so that at the time this deed was executed it appears that an account had been taken). “And whereas it has been agreed by and between the said *Simon Fraser* the grandfather, *Simon Fraser* the grandson, and *James Henry Houstoun*, that the whole of the said debts and credits of the said *Simon Fraser* the grandfather, shall be received and paid by *Simon Fraser* the grandson, and *James Henry Houstoun*.”—Now, if the same construction be not put on those words as has been done by my Lord Chief Justice, this consequence would necessarily follow, viz. that the two in-coming partners might receive all the credits of *Fraser* the grandfather; and yet afterwards say, that there was no consideration moving from them for such a benefit, nor were they under any obligation to pay his debts.—With respect to the argument, that it would be a hardship on *Houstoun*, who is only interested to the extent of one-third, if he should be liable to all the debts of the grandfather, contracted previously to his becoming a partner, yet that might be urged in every case of partnership. If a partner is only interested to the extent of one hun-

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dredth share of the partnership concern, he is still liable for the whole of the debts. Great weight is due to the argument for the plaintiffs, that the question as to the proportions, is not to be looked at with reference to the relative situations of the two in-coming partners, which was a mere matter of arrangement between themselves, and with which the grandfather, on retiring from the concern, had nothing whatever to do.

Mr. Justice BURROUGH.—It is quite obvious that the agreement, whatever it was, which appears on the face of this deed, was entered into after the account of the concerns of *Simon Fraser* the grandfather had been taken. Why then are we to presume that there was a separate and independent agreement unconnected with the deed? It appears to me to be clear that the deed must be considered as the attestation of the agreement, or final arrangement between the parties. The whole was one transaction, attested by the parties at the time of execution, and it cannot be considered for a moment that they intended to act on an agreement *dehors* that deed. When the debts and credits were ascertained, the parties intended to consider them as the material part of the transaction, and they were to be taken as the foundation of the whole of the deed; there can consequently be no reason to presume but that the account of the concerns of the grandfather had been taken and ascertained at the time of the execution of the instrument in question. It was, therefore, not a recital of any previous or independent agreement, but formed part of one and the same transaction, and was equally binding on the parties as the subsequent parts of the deed.

Judgment for the plaintiffs.

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TIPTON v. MEEKE.

Friday,
Feb. 6th.

THIS was an action of trover brought against the defendant as messenger under a commission of bankruptcy, in order to try the validity of a commission which had been issued against the plaintiff.

At the trial, before Mr. Baron *Garrow*, at *Gloucester*, at the Spring Assizes, 1819, the jury found a verdict for the defendant; and in the *Easter Term* following, the plaintiff obtained a rule to shew cause why it should not be set aside and a new trial granted, on the ground of surprise; and that the only evidence of an act of bankruptcy, was a confidential communication made by him to his attorney; and on producing satisfactory affidavits in support of that fact, the rule was afterwards made absolute.

Where the plaintiff obtained a rule for a new trial, but neglected to carry the cause down for more than four terms, the Court would not discharge the rule on motion, unless a term's notice of such motion had been previously given.

Mr. Serjeant *Pell* now applied for a rule, calling on the plaintiff to shew cause why that rule should not be discharged, on affidavits, which stated that the plaintiff had not yet taken the cause down to be re-tried, and that the defendant had not gone down to trial by *proviso*, as since the rule for the new trial had been made absolute, the plaintiff had entered into an arrangement with his creditors, for the purpose of superseding the commission.

But it appearing that a term's notice of this motion had not been given to the plaintiff, which the Court held was absolutely necessary, as no proceedings had been taken in the cause for more than four terms exclusively—

The learned Serjeant took nothing by his motion (a).

(a) See 2 Tidd, 7th edit. 797.

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SPOONER v. WHISTON.

Where the plaintiff executed a deed of composition, which contained a proviso, that in case all the creditors did not accede to the terms therein proposed, and execute the deed within a certain time from the date thereof, it was to be void; and one of the creditors afterwards received from the defendant a sum in full satisfaction of his demand, without acceding to the proposed arrangement or executing the deed:—Held, that this was a fraud on the general creditors, and did not prevent the plaintiff from recovering his original demand, although he had executed the deed.

THIS was an action brought by the plaintiff as the holder, against the defendant as the acceptor of a bill of exchange for 700*l*.

At the trial, before Lord Chief Justice *Gifford*, at *Guild-hall*, at the first Sittings in this Term, the acceptance was admitted; but the defence rested on a deed of composition, which had been entered into between the defendant and his creditors, and which the plaintiff had signed, and by which he and the other creditors had agreed to accept a certain sum in lieu of their respective debts, according to the provisions contained in the deed.—On its production, after reciting that the defendant had previously agreed to pay his creditors 7*s*. 6*d*. in the pound, which he could not accomplish; it was provided, that such agreement should be abandoned, and that a person, by the name of *Wilkinson*, should assign to the defendant his share in a certain partnership, and that the partnership deeds should be delivered up as a security, until 1000*l*. was obtained from the partnership estate and effects, which, on being received, was to be divided equally amongst all the creditors of the defendant, without any respect to priority of claim. The deed also contained a proviso, that if the defendant and *Wilkinson* did not provide that sum, or in case all the creditors did not, within three months from the date of the indenture, accede to the arrangement therein proposed, and execute the deed, it was to be null and void, and the above sum of 1000*l*. paid back to the credit of *Wilkinson's* estate. It appeared, that five of the creditors had not executed the deed, although two of them had received a dividend according to the terms therein contained, and two others had procured bills of exchange to the amount of their dividend, and the fifth was the defendant's brother.

and not a general creditor. It turned out, however, that another creditor who claimed a debt of from 50*l.* to 60*l.* from the defendant, had received the sum of 40*l.* in full payment of such demand, after this arrangement had been entered into, and to which he refused to accede, or execute the deed, and that such sum was received by him without the knowledge of the other creditors. His Lordship being of opinion, that this was a fraud on the general creditors, as the manifest intent of the deed was, that all should share *in pari passu*, and as one of such creditors had not executed it or agreed to come in under the arrangement therein proposed, but accepted a sum in discharge of his demand on the defendant, the deed could not be set up as against the plaintiff's demand, although he had executed it; or that, at all events, it was void as against all those who had not; and the Jury accordingly found a verdict for the plaintiff.

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Mr. Serjeant *Taddy* now applied for a rule *nisi*, that this verdict might be set aside and a new trial granted; and submitted, that although the defendant might, under the circumstances, have no valid defence at law, yet he was clearly entitled to relief in equity, the plaintiff having executed the deed, and thereby consented to accept of the terms therein contained, and although the deed might not have been executed by some of the creditors, still, if they had accepted any benefit under it, they would be equally bound as if they had signed it; as in *Jolly v. Wallis (a)*, where a clause was introduced into a composition deed for making it void, unless all the creditors executed it; it was held, that it was not invalidated by the non-execution of a creditor who accepted an instalment under it: and Lord *Kenyon* there said (*b*), "if the creditors have all come in and taken the security proposed by the agreement for the

(a) 3 Esp. Rep. 228.——(b) *Id.* 231.

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composition, though they have not actually signed it, I shall hold that they have acquiesced in the composition, and consented to come in under it." So, in *Sadler v. Jackson* (a), it was held, that if creditors act under a composition, they are as much bound by it, as if they had signed the composition deed; and in *Spottiswoode v. Stockdale* (b), it was decided, that a deed of composition not signed by all the creditors within the time stated in it, although void at law, yet that if the creditors who had not signed, acted under it, it was good in equity. So, here, the creditors who had not executed the deed, either received a dividend under it, or procured bills of exchange for its amount, according to the stipulations contained in the deed.

Lord Chief Justice GIFFORD.—Although I am extremely anxious that any opinion I may have pronounced at *Nisi Prius* should be re-considered by the Court, I still think, that the view I took of this case at the trial was correct; and I now see no reason to come to a different conclusion. The defendant, by the terms of the composition deed, agreed that the sum of 1000*l.* to be obtained from *Wilkinson's* estate, should be divided amongst all his creditors in satisfaction of their debts, without any priority or preference. This shews that all the creditors were to share equally in the distribution of that sum; and it was further provided, that in case they did not all accede to the terms therein proposed, and execute the deed within three months from the time of its date, it should be null and void. It was contended, that although all the creditors had not executed the deed, yet as they had agreed to accept the composition by coming in under it, they were barred from disputing it; but, it appeared that a creditor whose debt was enumerated in a schedule an-

(a) 15 Ves. 52.—(b) Cooper, 102.

nexed to the deed, and who had refused to execute it, although most of the others had signed, received the sum of 40*l.* in full of his demand, and thereby relinquished all further claim as against the defendant, without coming into the arrangement made with the general creditors under the terms of the deed. I was of opinion, that this was a fraud on them; and consequently, that the deed furnished no answer to the plaintiff's demand, although he had signed it; and more particularly so, as it contained a provision, that if *all* the creditors did not come in and execute the instrument, it was to be null and void. Although two of those creditors who had not executed, had not actually received a composition according to the terms of the deed, still they had obtained securities to the amount of their dividend under such composition, after the deed had been executed by the other creditors; they might, therefore, perhaps be estopped from disputing its validity, but as one of the creditors accepted a sum in full satisfaction of his demand, without coming in under the deed, or acceding to the terms therein proposed, and without the knowledge or assent of the general creditors; I thought it was so far a fraud as to vitiate the instrument altogether, and I therefore very much doubt, whether under the circumstances, the defendant will be entitled to any relief in equity.

Mr. Justice PARK.—I am of opinion, that the view my Lord Chief Justice took of this case at the trial, was perfectly correct. It is unnecessary to advert to any decided cases, as here there was a clear fraud on the general creditors, as one of them not only refused to come in under the deed, but actually received a certain sum from the defendant in full of all demands, after the deed had been executed by several of the other creditors. The principles which have been established in the cases which have been cited, do not appear to me to be applicable to the

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present, as they turned on the point that all the creditors had acted under the composition, or acceded to the arrangement therein proposed.

Mr. Justice BURROUGH.—By the terms of this deed *all* the defendant's creditors should have either signed it, or acquiesced with the terms therein contained, and it appears, that one of them, instead of so doing, received a certain sum of money in satisfaction of his demand on the defendant, without coming in or even referring to the terms of the deed. This was clearly a fraud on the general creditors, and therefore, there is no pretence or colour for saying, that the plaintiff is bound by the terms of the deed, although he had executed it, by which he merely agreed to put himself on the same footing with all the other creditors.

Rule refused.

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 Feb. 6th.

PRIOR v. The Duke of BUCKINGHAM.

The Court allowed several avowries in replevin to be amended by altering the name and description of the *locus in quo*, and stating the holding to have been for a year instead of half a year, and also by adding new avowries, varying the amount of the rent; although issue had been joined and notice of trial

THIS was an action of replevin, in which there were several avowries and pleas in bar, and on which issue had been joined previously to the last *Trinity Term*. A notice of trial had been given for the last Summer Assizes, on the 11th July, 1823, and countermanded on the 18th, and no further proceedings were taken until the 29th of *January* last, when Mr. Serjeant *Peake* obtained a rule *nisi* to amend the several avowries as pleaded by the defendant; *first*, by altering the names of a farm and close, throughout the whole of the avowries; *secondly*, by making an alteration as to the amount of the rent, and also by stating the holding to have been for a year, instead of half a year; *thirdly*, by inserting certain exceptions

given and countermanded, and more than two terms had elapsed previously to the application for the amendment.

and reservations in the several demises as laid in the avowries; and *lastly*, by adding several new avowries varying the amount of the rent. He founded his motion on an affidavit, which stated that the plaintiff held two different farms under the defendant; that alterations and reductions had been made in the rents, and that in some of the avowries the farms had been improperly described. The learned Serjeant submitted, that as a declaration might be amended under similar circumstances, it would apply equally to the case of an avowry, and he relied on *Dryden v. Langley* (a), where the defendant having avowed for a quit rent, was allowed, after issue joined, to amend by adding three avowries for such rent, payable at different times, on certain terms, *viz.* on payment of costs, and the defendant's rejoining gratis and taking short notice of trial.

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Mr. Serjeant *Lawes* now shewed cause, and submitted, that this application was not only made too late, but was too extensive in terms; or that, at all events, the Court would not allow new avowries to be added, as more than two Terms had elapsed since issue was joined, and even in the case of a declaration, new counts cannot be added after the end of the second Term. Besides, here it is sought not only to vary the amount of the rent, but to state the holding to have been for a year instead of half a year, which not only extends the terms of the avowries in two most material points, but would tend to increase the damages and costs of suit.

The Court, however, observed, that, if the defendant did not know the precise rent or terms under which the plaintiff held at the time of pleading the avowries, the indulgence prayed for was reasonable, and ought to be grant-

(a) Barnes, 3rd Edit. 22.

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ed; and more particularly so, as the plaintiff did not deny his holding under the defendant. The rule for the amendment was consequently made

Absolute on payment of costs.

Saturday,
Feb. 7th.

CHAMBERS, Plaintiff; BLAKE, Tenant; BAMPFYLDE,
Vouchee.

A recovery may be amended by inserting the words "the advowson of" before those of "the rectory of the church of H." on an affidavit stating that there had been no vacancy since the recovery was suffered, and that the church was now full.

MR. Serjeant *Pell* moved that this recovery might be amended by inserting the words "the advowson of" before those of "the rectory of the church of *Hatch Becham*." He founded his motion on an affidavit, which stated, that the recovery was suffered in 1799; that there had been no vacancy since that period, and that the church was now full; and that in the deed to make a tenant to the *præcipe*, the premises were described as the advowson, right of patronage and presentation, of, in and to the rectory of *Hatch Becham*.

Fiat.

Monday,
Feb. 9th.

HILLIARD v. SMITH.

In an action against the defendant as acceptor of a bill of exchange, the Court will not compel the plaintiff to deposit it in the hands of the Prothonotary, to enable the defendant to inspect it, in order to ascertain whether his signature to it had been forged.

MR. Serjeant *Onslow* on a former day in this Term, had obtained a rule, calling on the plaintiff to shew cause, why a bill of exchange on which this action was brought, and under which the defendant had been arrested, should not be delivered over or impounded in the hands of the Prothonotary, and that the defendant might be permitted to inspect it, in order to ascertain whether his signature to

it was a forgery or not, and that in the mean time all further proceedings might be stayed. He founded his motion on an affidavit, which stated, that the defendant had been arrested at the suit of the plaintiff, as the acceptor of a bill of exchange for 17l. 10s.; that he had never to his knowledge or recollection accepted such a bill, and that, since the arrest, he had applied to the plaintiff to let him see it, but which he had positively refused to do. The learned Serjeant observed, that the Court of *Exchequer* had lately granted a similar application in the case of a bond, on an affidavit made by the defendant, that he had been sued as a co-obligor, and that he believed that the signature to the instrument was not in his hand-writing, as he had no recollection of having ever executed such a security.

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On Mr. Serjeant *Pell's* being now about to shew cause, the Court observed, that as no instance had been adduced in which such an application had been granted (a), or any authority referred to in its support, they would not interfere in this stage of the proceedings, as it might have the effect of compelling the plaintiff to furnish evidence against himself; and that, if there were any grounds for suspecting that the defendant's signature to the bill was a forgery, it might be taken advantage of at the trial. They also said, that the Prothonotary had stated, that he never recollected an instance where a bill of exchange had been deposited with him under circumstances similar to the present. The case of a bill of exchange differs materially from that of a bond or other instrument under seal, as there the defendant may crave oyer, in which case he would be entitled to a copy of it, and the instrument is then considered as in the hands of the Court. They, there-

(a) See 1 Tidd, 7th edit. 610, *contrà*.

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fore, ordered this rule to be discharged, and directed the costs to abide the event of the trial (a).

(a) See *Chetwind v. Marnell*, 1 Bos. & Pul. 271, where the Court refused to make a rule on the plaintiff in an action on a bond, to allow an officer of the stamp duties to inspect it, because the defendant suspected it to be forged. And see *Thelfall v. Webster*, 7 B. Moore, 559.

Monday,
Feb. 9th.

SIMSON v. COOKE and Others, Executors of WILLIAM
PEARETH, deceased.

Where the defendant as surety in a bond, which, after reciting that his principals A. B. and C. D. were bankers at *Sunderland*, was conditioned for the securing such sum or sums as should be advanced to most bills of exchange drawn by A. B. and C. D. or either of them on the plaintiffs, (the obligees), who were bankers in *London*, under a penalty

of 5000*l.*:—Held, first, that the bond having been given previously to the passing of the statute 48 Geo. 3, c. 149, was properly stamped with a 7*l.* stamp, as being applicable to the amount of the penalty under the statute 44 Geo. 3, c. 98. Secondly, that the bond did not extend beyond the continuance of the partnership between A. B. and C. D.; and consequently, that the surety was not liable for the amount of bills drawn by C. D. after the death of A. B.; and lastly, that remittances made by the survivor after the death, must be appropriated in the first place in liquidation of the partnership balance then due, there being no balance struck or rest made in the accounts in the books of the obligees, and such remittances having been made on the general account, without any specific mode of application.

THIS was an action of debt against the defendants, as executors of *William Peareth* deceased, on a joint and several bond, bearing date the 12th August, 1805; whereby *John* and *Thomas Cooke* as principals, and *Peareth* the testator, as their surety, became bound to *Patrick Crawford Bruce*, the plaintiff, and *George Taylor*, of *London*, bankers, in the penal sum of 5000*l.*—The declaration stated, that *Peareth* in his life-time, and in the life-time of the said *P. C. Bruce*, and *George Taylor* now deceased, and whom the plaintiff hath survived, to wit, on the 12th August, 1805, by his certain writing obligatory, acknowledged himself to be held and firmly bound unto the said *P. C. Bruce*, the plaintiff, and *G. Taylor*, in the sum of 5000*l.*; yet, that *Peareth* in his life-time, and the defendants, (his executors), since his death, (although often requested so to do,) have not, nor have, nor hath any or either

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of them as yet paid the said sum of 5000*l.* or any part thereof, to *Bruce*, the plaintiff, and *Taylor*, or to any or either of them, in the respective life-times of *Bruce* and *Taylor*, or to the plaintiff since their deaths.—The plaintiff having made a *profert in curia* of the bond, the defendants pleaded *non est factum*.

The plaintiff then prayed that the bond and condition might be enrolled, and which were set out as follows:—
“We *John Cooke* and *Thomas Cooke*, both of *Sunderland*, in the county of *Durham*, bankers, carrying on business under the firm of *Cooke & Co.*, and *William Pear-eth* of *Usworth* in the same county, *Esquire*, are jointly and severally held and firmly bound to *Patrick Crawford Bruce*, *George Simson*, and *George Taylor*, of *Bartholomew Lane*, in the City of *London*, bankers and partners, carrying on business in the firm of *Were, Bruce, Simson, and Taylor*, in the penal sum of 5000*l.*, to be paid to the said *P. C. Bruce*, *George Simson*, and *George Taylor*, their attorney, executors, administrators, or assigns;—for which payment, we bind ourselves, and each of us by himself, for the whole, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, dated the 12th *August*, 1805. The condition of the bond, was as follows;—“Whereas the said *John Cooke* and *Thomas Cooke*, have applied to and requested the said *P. C. Bruce*, *George Simson*, and *George Taylor*, to permit them, the said *John Cooke* and *Thomas Cooke*, or persons authorized by them, to draw bills on the said *P. C. Bruce*, *George Simson*, and *George Taylor*, for their acceptance and payment, they the said *John Cooke* and *Thomas Cooke* engaging to pay or remit to the said *P. C. Bruce*, *George Simson*, and *George Taylor* the amount of such bills, at or before the time such bills shall become respectively due and payable; and in order the better to secure the said *P. C. Bruce*, *George Simson*, and *George Taylor*, or any of them, associated or not with any other person or persons in the same or any other firm of busi-

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ness, the due and punctual remittance of money, to pay the said bills so to be accepted by them in manner aforesaid; and also the payment of all such sum and sums of money as they the said *P. C. Bruce, George Simson, and George Taylor*, or any of them, associated or not as aforesaid, shall or may at any time hereafter advance for the said *John Cooke and Thomas Cooke*, or which shall or may be due or owing, or payable to them the said *P. C. Bruce, George Simson, and George Taylor*, or any of them, associated or not as aforesaid, from the said *John Cooke and Thomas Cooke*, or any or either of them, at any time hereafter, on any account whatsoever; they the said *John Cooke and Thomas Cooke* have agreed to execute a bond to the said *P. C. Bruce, George Simson, and George Taylor*, together with the said *William Pearce* as their surety, in manner hereinafter mentioned; and in consideration thereof, the said *P. C. Bruce, George Simson, and George Taylor* have agreed to comply with such request for so long a time as they the said *P. C. Bruce, George Simson, and George Taylor* may think proper: Now, therefore, the above written obligation is such, that, if the said *John Cooke and Thomas Cooke*, their executors and administrators, do and shall well and truly remit to the said *P. C. Bruce, George Simson, and George Taylor*, and every of them, associated or not as aforesaid, the amount of all and every such sum and sums of money as they the said *John Cooke and Thomas Cooke*, or either of them, or any other person or persons authorized by them or either of them, shall or may draw on the said *P. C. Bruce, George Simson, and George Taylor*, or any of them, associated or otherwise as aforesaid respectively, or made payable at their house, as and when the same bills and notes shall respectively become due and payable, and also shall and do from time to time well and truly pay or cause to be paid unto the said *P. C. Bruce, George Simson, and George Taylor*, and every of them, associated or not as aforesaid, their and each of their heirs, executors, and ad-

ministrators, all such sum and sums of money as shall or may be paid by them, the said *P. C. Bruce, George Simson, and George Taylor*, or any or either of them, associated or not as aforesaid respectively, for or on account of any note or notes, bill or bills of exchange which shall or may at any time hereafter be drawn by them the said *John Cooke and Thomas Cooke* or any or either of them, or any person or persons authorized by them as aforesaid, and accepted by the said *P. C. Bruce, George Simson, and George Taylor*, or any of them, associated or not as aforesaid, or made payable at their house, and also all such sum and sums of money as they the said *P. C. Bruce, George Simson, and George Taylor*, or any of them, associated or not as aforesaid, shall or may at any time hereafter pay, expend, lend, or advance to or for the said *John Cooke and Thomas Cooke*, or any or either of them, or which shall or may at any time hereafter be due to them the said *P. C. Bruce, George Simson, and George Taylor*, from the said *John Cooke and Thomas Cooke* on any account whatsoever, together with interest for the same, from the time the same shall be advanced and paid by or due and owing to them the said *P. C. Bruce, George Simson, and George Taylor*, or any or either of them, associated or not as aforesaid respectively, after the rate of 5*l. per cent. per annum*, and the usual and accustomed commission, costs, charges, damages and expenses, which shall or may at any time hereafter be incurred, suffered, borne, paid, or sustained by the said *P. C. Bruce, George Simson, and George Taylor*, or any of them, associated or not as aforesaid, their executors or administrators, on account of the matters aforesaid, and also all such sum and sums as they the said *P. C. Bruce, George Simson, and George Taylor*, or any of them, associated or not as aforesaid, shall or may be bound or liable, or security to pay, for or on account of the said *John Cooke and Thomas Cooke*, or any or either of them: then, and in such case, the above written obligation

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to be void, otherwise to be and remain in full force and virtue.

The plaintiff then proceeded to assign the following breaches, under the statute 8 & 9 *Will. 3*, c. 11, s. 8, viz. that from the date of the bond, until the 23d *April*, 1808, Messrs. *Bruce*, *Simson*, and *Taylor*, continued associated as partners; that on that day *Taylor* died; and that from thence until the 1st of *July*, 1808, Messrs. *Bruce* and *Simson* continued associated as partners; that from that day to the 1st *January*, 1809, Messrs. *Bruce*, *Simson*, *Stephenson*, and *Freen*, were associated as partners; that on the latter day *Stephenson* retired, and that from thence to the death of the said *William Pearce*; *Bruce*, *Simson*, and *Freen*, continued associated as partners: that after *Stephenson's* retirement, viz. in 1811, one *H. Mackenzie* was admitted a partner, who continued till 1817; and that Messrs. *John* and *Thomas Cooke*, from the time of making the bond to the death of *Thomas Cooke*, viz. on the 9th *May*, 1814, continued associated as partners. — It was then suggested, that, from the making of the bond to the death of *Pearce*, Messrs. *Cooke & Co.* drew bills on the *London* houses to the extent of 5000*l.* for which they neglected to remit, and that from the date of the bond to the death of *Thomas Cooke*, the country house drew bills, and made notes payable at the *London* houses for sums amounting to 5000*l.*, which were still due; and that the *London* house paid, lent, and advanced to the country house sums of money to that amount: that from the making of the bond to the 20th *April*, 1808, there was due to Messrs. *Bruce*, *Simson*, and *Taylor*, 5000*l.*; that on the 30th *June*, 1808, there was due to Messrs. *Bruce* and *Simson*, the like sum; that on the 31st *December*, 1808, there was due to Messrs. *Bruce*, *Simson*, *Stephenson*, and *Freen*, 5000*l.*; and that on the 5th *August*, 1810, the like sum was still due to them. There were also several other breaches for the non-payment of monies advanced by the several partnerships of *Bruce*, *Simson & Co.*, to *John* and *Thomas Cooke* during

their joint lives, and to *John Cooke* after the death of *Thomas Cooke*.

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At the trial, before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after the last *Trinity Term*, the plaintiff, after proving the execution of the bond, which was stamped with a £7 stamp, called a clerk in the house of Messrs. *Were, Bruce, & Co.* who proved that *John* and *Thomas Cooke* being bankers at *Sunderland*, in their usual and accustomed course of business, drew bills upon *Were, Bruce & Co.* as their *London* bankers, and made drafts and notes payable at their banking house, to answer which, *Cooke & Co.* remitted bills and cash to *Were, Bruce & Co.* from time to time; that such dealings were continued down to the month of *May*, 1814, when *Thomas Cooke* died, at which period, there was a balance due from *Cooke & Co.* to *Were, Bruce & Co.* of 119,534*l.*; that after his death, the business went on in the same way as before; that no new account was opened, no balance struck, nor rest made in the books of *Were, Bruce & Co.*; but that bills were drawn by *John Cooke* upon them, and notes were made payable by him at their banking house; that remittances of bills and cash made by him to them, and continued from time to time, were carried to the general account as it then stood, and that the amount of the remittances by *John Cooke*, subsequently to the death of *Thomas*, considerably exceeded 119,534*l.*, the balance then due to *Were, Bruce & Co.*; but that the balance was constantly in favour of their house, and was never so low as 5000*l.*; that on the 2d *July*, 1816, Messrs. *Were, Bruce & Co.* suspended their payments; and shortly afterwards, *John Cooke* became bankrupt, and on the final adjustment of accounts between the two houses, a balance of 65,000*l.* remained due from Messrs. *Cooke & Co.*, to Messrs. *Were, Bruce & Co.*—But the witness allowed, that if the credits since the death of *Thomas Cook* had been applied in the first instance in payment of the balance then due, such balance would have been more than discharged.—For the de-

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defendants, it was objected, *first*, that the bond which was stamped with a 7*l.* stamp, being intended to secure a balance of uncertain amount, ought, under the statute 44 Geo. 3, c. 98, Schedule A. to have been stamped with a 20*l.* stamp. *Secondly*, that under the terms of the condition of the bond, the defendants, as executors of *William Pearce* the surety, were not liable for any advances made by *Were, Bruce & Co.*, to *John Cooke* after the death of *Thomas Cooke*; and *lastly*, that even if they could be considered as being so liable, still, that the remittances made by *John Cooke* after the death of *Thomas*, ought in the first place to have been applied in reduction of the balance due at the time of such death.—The jury, under the direction of the learned Judge, found a verdict for the plaintiff for 5000*l.* debt, and 1*s.* damages, subject to the opinion of the Court as to the sufficiency of the stamp, the cessation of the defendant's liability in consequence of the death of *Thomas Cooke*, and the extinction of the balance then due; and it was directed, that if the opinion of the Court should be with the defendants on the first point, a nonsuit was to be entered; and if on the second or last, the verdict was to be reduced, and entered for one shilling damages only.

Mr. Serjeant *Bosanquet*, in the course of the last Term, accordingly obtained a rule *nisi* to that effect; and in support of the *first* objection as to the insufficiency of the stamp, he relied on the case of *Scott v. Allsop* (a); *secondly*, as to the determination of the liability of the defendants under the terms of the bond, he cited the cases of *Strange v. Lee* (b); and *Weston v. Barton* (c), and in support of the latter objection as to the appropriation of the remittances made on account by *John* after the death of *Thomas Cooke*, he referred to *Clayton's case* (d), *Bodenham v. Purchas* (e),

(a) 2 Price, 20. — (b) 5 East, 484. — (c) 4 Taunt. 673.
 — (d) 1 Meriv. 572. — (e) 2 Barn. & Ald. 39.

and *Brooke v. Enderby* (a). The Court recommended, that the facts should be turned into a special case, which not having been complied with—

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Mr. Serjeant *Vaughan* and Mr. Serjeant *Cross* now shewed cause, and submitted in the first place, as to the objection raised with respect to the insufficiency of the stamp; that it must be considered that the bond was given before the stat. 48 Geo. 3, c. 149 was passed, by which a stamp of 20*l.* was imposed on bonds intended to secure the payment of a fluctuating balance which might exceed 5000*l.*, and even if the provisions in that statute can be considered as a declaratory enactment, it cannot apply to the present case, which must be decided on the construction of the statute 44 Geo. 3, c. 98, and by which alone the stamp on the bond must be regulated, as it was executed three years previously to the passing of the 48 Geo. 3, c. 149. It must, therefore, as far as regards the present question, be considered as if that statute had never been passed. Now, the 44 Geo. 3, c. 98, made no provision as to the stamp requisite to be imposed on bonds, in cases of indefinite and fluctuating balances, but which was remedied by the latter statute of the 48 Geo. 3. The penalty of the bond therefore in this case, must be considered as the sum intended to be secured by the 44 Geo. 3, and as such penalty amounted to 5000*l.* the 7*l.* stamp impressed on the bond was perfectly consistent with the appropriate duty; and as the case of *Scott v. Allsop* arose and was decided on the construction of the statute 48 Geo. 3, c. 149, it cannot apply to the present question, or be considered as an available authority for the defendants, as no provision was made in the 44 Geo. 3, for bonds which were intended to secure fluctuating balances. In *Pruessing v. Ing* (b), it was decided, that an additional sum accruing in the

(a) 4 B. Moore, 501.—(b) 4 Barn. & Ald. 204.

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way of interest, need not, with reference to the stamp duty, be considered in computing the amount of the stamp for the principal sum: and Lord Chief Justice *Abbott* there said, "that the object of the legislature was, to impose a *pro rata* stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money. That the words "sum of money," in the statute 55 Geo. 3, c. 184, Schedule Part I, meant the principal sum mentioned in the note, and not a sum compounded of principal and interest; that a contrary decision would be most mischievous, and have the effect of avoiding many securities; for that it had been the constant practice, under similar provisions applicable to bonds in that and former stamp acts, to measure the stamp duty by the principal sum secured, although interest was always made payable from the date of the bond." The accumulating interest in that case must be considered in the same light as a varying or fluctuating balance in a bond of this description, and the sum secured in the language of the statute 44 Geo. 3, can only apply to the penalty by which the principal sum is to be secured.—*Secondly*, as to the liability of *Peareth* the testator, in his capacity of surety; it is quite evident from the language of the condition of the bond, that his liability was not to be restricted to sums advanced by the obligees to meet bills drawn by *John Cooke* and *Thomas Cooke*, or either of them, or to debts contracted by them during their joint lives only, but was to extend to the amount of all such sums as the obligees should at any time after the date of the bond, pay, expend, lend, or advance, to or for the said *John Cooke* and *Thomas Cooke*, or any or either of them, on any account whatever. So long, therefore, as the business continued in their hands, or was carried on by either of them; or if one of them had retired and the other continued to carry it on, and no new partner had been introduced, the surety would still have continued liable in respect of any

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debt which either of the *Cookes* might have contracted with the obligees. A supposed intention cannot be set up in opposition to express words; and here there is nothing in the condition of the bond to shew, that the liability of the surety was to be confined to bills drawn, or debts contracted during the joint lives of both his principals, or that it would not continue after the death of one, or if either of them had retired from the concern. In the construction of instruments of this description, the Courts have always resorted to the intention of the parties; and although the case of *Lord Arlington v. Merricke* (a), has established the principle, that a surety for six months cannot be made answerable for twelve; yet, there the condition of the bond having stated, that the principal was appointed deputy post-master for the term of six months following the date of the bond; it is evident that the parties thereby intended, that the surety should only be liable for that period. Here, however, if in the life-time of *Thomas Cooke*, either he or his brother had drawn in his own name, it might have been said that the surety would not have been liable, unless the bills were intended to apply to a partnership transaction, but the responsibility of the latter could not have been so controlled. So, if *Thomas Cooke* had retired, the surety would be still liable, although the partnership between both the *Cookes* would have ceased to exist, as the bond was intended to apply to all transactions as between *John* and *Thomas Cooke* and the obligees, although one or either of the former might have withdrawn from the concern; and if this be so, such liability must continue, notwithstanding the death of one of them. Lastly, even supposing, that the liability of the surety was confined to advances made by the obligees during the joint lives of *John* and *Thomas Cooke*, still as the course of business between these parties was, for the latter to draw bills and

(a) 2 Wms. Saund. 408.

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make notes payable at the house of the former as their *London* bankers, and then to make remittances to meet such bills and notes, or advances made in respect thereof, it is quite clear, that every remittance must, according to the nature of the transaction, be considered *pro tanto* in discharge of the concurrent drafts, drawn upon the obligees, or discharging the sum advanced by them on the bills or notes preceding each remittance; and if so, the sums remitted after the death of *Thomas Cooke* being insufficient to meet subsequent advances, and as a large balance remained in respect of debts incurred before his decease, and continued unliquidated to a far greater extent than the amount of the verdict, it is immaterial whether the liability of the defendant's testator continued after the death of *Thomas Cooke* or not.

Mr. Serjeant *Bosanquet* in support of the rule, submitted, that although the case of *Scott v. Allsop* was determined upon a question arising under the statute 48 Geo. 3, c. 149, which was passed subsequently to the date of the bond, yet that it had established a principle applicable to the present question, and on which the objection as to the stamp might be supported, viz. that the amount of the penalty or penal sum mentioned in the bond, is not the criterion for regulating the amount of the stamp, or the sum intended to be secured by such an instrument; for that case decided in terms, that a bond for securing money already advanced, and to be advanced in future in an account current, cannot be received in evidence, unless it bear a 20*l.* stamp; although the obligation was under a penalty in a sum certain, and even less than 20,000*l.* It is quite clear, that if the bond in question had been executed after that statute had passed, it would have fallen expressly within the decision of that case. Here, however, although the penal sum is only 5000*l.*, and if the bond had only been intended to secure that sum, then as

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soon as it had been once advanced and repaid, the object of the bond might have been satisfied; yet if it were to be used as intended, viz. as a security for a balance of a much larger amount, and even exceeding 20,000*l.*, then the highest stamp was requisite, according to the provisions of the statute 44 *Geo.* 3, c. 98, Schedule A., as being a bond given as a security for a sum exceeding 20,000*l.*, and it therefore ought to have been stamped with a 20*l.* stamp. It cannot be contended for a moment, that the penalty was not the only sum intended to be secured, for the object of the bond and the express intention of the parties was, to secure balances to an uncertain and indefinite amount, and even exceeding the sum of 20,000*l.*—As to the extent of the liability of the defendant's testator as surety, or whether the bond could apply to money advanced after the death of *Thomas Cooke*, it must depend upon the apparent intention of the contracting parties, to be collected from the terms and language of the bond. The three obligors were jointly and severally liable, the two first in their character of bankers, and the third individually. The two principals were not only described as bankers, but as carrying on business under the firm of *Cooke & Co.*; and in the reciting part of the condition, it appears that *Peareth* (the testator), became surety for *John* and *Thomas Cooke*, or either of them. That must be taken to apply to them in their firm or character of bankers; and even if that were not so, the liability of the surety cannot continue after the death of one of them, for if it had been so intended, the words "or the survivor of them," would have been introduced. But the clear import of the condition is, that the surety was only to continue liable for bills drawn by, or advances made to the firm of the two *Cookes* during their joint lives, when either of them might draw bills; but after the death of one, and the settlement of his affairs by his representatives, it cannot be contended, that his assets, if any remained, should be liable during the life of the survivor. From the case of Lord *Arlington*

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v. Merricke, which is considered as a leading authority, and an uniform train of decisions since, to that of *Weston v. Barton*, it appears to be a clear and established principle, that when a change takes place in the number of persons to whom a bond of this description might be given, it no longer exists as a security, or if one of the obligees die, it is at an end; and consequently, the liability of a surety cannot in such a case be extended beyond the joint lives of his principals, for whom he only intended to be responsible during the continuance of the partnership or connection which subsisted between them at the time of the execution of the instrument. So, here, the defendant's testator might have placed great confidence in the deceased, and he was not bound to rely on the integrity or principles of the survivor;—independently of which, the words “or either of them” must be confined or taken to mean one or either, whilst they both continued as partners, and carried on the business of bankers under the firm of *Cooke & Co.*—With respect to the remittances made after the death of *Thomas Cooke*, it is quite clear, as there was no specific appropriation of them either by the party remitting or receiving, and not even a balance struck, or rest made in the books of the obligees at that time; that such remittances must be first applied in discharge of the earlier debt, viz, the balance due to them at the death of *Thomas Cooke*; and the late case of *Simson v. Ingham (a)*, in which all the previous authorities are collected and referred to, is sufficient to establish that principle. There, however, there were two separate transactions, and two distinct accounts rendered, but the appropriation was not complete; whilst here, there was only one continued and general account, by which it appeared, that the balance was reduced from 119,584*l.*, to 65,000*l.*, by remittances made subsequently to the death of *Thomas Cooke*; and in *Simson v. Ingham*, Mr. Justice Bayley lays it down as a rule (b),

(a) 2 Barn. & Cress. 65.—(b) *Id.* 72.

that, "where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners, must be applied to the old debt."

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Lord Chief Justice GIFFORD.—In this case, an application has been made by the defendants to set aside the verdict found for the plaintiff, and that, instead thereof, a nonsuit might be entered, on the ground that the bond on which the action was brought was improperly stamped, and that if they should fail in that application, then that the damages which have been assessed for the plaintiff for 5000*l.* on the breaches assigned, might be reduced to the sum of 1*s.* The first question with respect to the nonsuit, will depend on the construction to be put on the statute 44 Geo. 3, c. 98. The bond on which the present suit was instituted, was entered into by three persons, as obligors, viz. John and Thomas Cooke as the principals, and William Peareth as their surety, in August, 1805, under a penalty of 5000*l.*, conditioned for the securing any balance which might become due from the *Cookes*, who were bankers at *Sunderland*, to *Were, Bruce, Simson & Co.* bankers in *London*, upon a running account between them; and it has been contended, that this bond should have had a 20*l.* instead of a 7*l.* stamp. By the 44 Geo. 3, c. 98, Schedule A. it is required, that on every bond given as a security for any sum of money not exceeding 100*l.*, there shall be a stamp of 1*l.*, and so on progressively, increasing in amount, according to the sum intended to be secured; and the words applicable to the bond in question are, "exceeding 4000*l.*, and not exceeding 5000*l.*"—7*l.* There is also another provision, viz. that "for a bond of any kind whatever, not otherwise charged in the schedule, or wholly exempted

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from duty, there shall be upon any number of words not amounting to thirty common law sheets, of which any such bond shall consist, a stamp of 1*l*."—After the passing of that statute, it was discovered that many bonds similar to the present, and intended to secure fluctuating balances for large sums of money, did not fall within its provisions, and in order to meet instruments of that description, a particular clause was introduced in the statute 48 *Geo. 3*, c. 149, Schedule, Part I, by which it was directed, that a bond given as a security for the re-payment of any sum or sums of money to be thereafter lent, advanced, or paid, or which might become due upon an account current, together with any sum already advanced or due, or without, as the case might be, where the total amount of the money secured or to be ultimately recoverable thereupon should be uncertain and without any limit, should be stamped with a 20*l*. stamp. From the latter statute it must be collected, that the legislature thought, either that bonds of this description had been altogether omitted in the 44 *Geo. 3*, c. 98, or that if they were included, they must be considered as falling within the clause requiring a stamp on the amount of the penalty in the bond, or within that which apportions the amount of the stamp to the number of words used; and consequently, in the 48 *Geo. 3*, a new and express enactment is introduced, requiring a stamp of 20*l*. on instruments of this description, and given as a security for the re-payment of any sum to be thereafter lent, where the total amount of the sum secured should be unlimited and uncertain. I am therefore of opinion, that this was either a *casus omissus* in the 44 *Geo. 3*, or that even if it were within it, the instrument in question must be treated as a bond for securing money to the extent of the penalty, or as requiring a stamp of 1*l*. only, according to the number of words therein contained. This case therefore, is not governed by that of *Scott v. Allsop*, and as the reasoning there is inapplicable, as it turned on the construction of the

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48 Geo. 3, and the bond in question was given before that statute was passed, it must be taken that it has been properly stamped, and if so, the verdict found for the plaintiff must stand.—But the more important question which arises in this case is, whether the defendants, as the executors of *Peareth* the surety, are liable for advances made to the *Cookes*, as bankers at *Sunderland*, after the death of *Thomas*. It has been admitted in the course of the argument, that this must depend on the general construction of the bond itself, which must be carefully and most accurately looked at, in order to discover the intention of the parties, so as to arrive at a true and proper conclusion. It begins with the words "*We John Cooke and Thomas Cooke, of Sunderland, bankers, carrying on business under the firm of Cooke & Co., and William Peareth, are jointly and severally bound to Patrick Crawford Bruce, George Simson, and George Taylor, of London, bankers, carrying on business under the firm of Were, Bruce, Simson, and Taylor, in the penal sum of 5000l.,*" and the language of the condition is, "*whereas John Cooke and Thomas Cooke have applied to P. C. Bruce, G. Simson, and G. Taylor, to permit them the said John Cooke and Thomas Cooke, or persons authorized by them, to draw bills on P. C. Bruce, G. Simson, and G. Taylor for their acceptance and payment, they the said John Cooke and Thomas Cooke engaging to pay or remit to the said P. C. Bruce, G. Simson, and G. Taylor, the amount of such bills, at or before the time such bills shall become respectively due, and in order the better to secure P. C. Bruce, G. Simson, and G. Taylor, or any of them, associated or not with any other person or persons in the same or any other firm of business, the due and punctual remittance of money to pay the bills so to be accepted by them, and also the payment of all such sum and sums of money as they the said P. C. Bruce, G. Simson, and G. Taylor, shall advance for the said John Cooke and Thomas Cooke, or which shall or may be due*

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or owing, or payable to them the said *P. C. Bruce, G. Simson*; and *G. Taylor*, from the said *John Cooke and Thomas Cooke*, or any or either of them, at any time thereafter, on any account whatever, they the said *John Cooke and Thomas Cooke*, together with *William Pearse* as their surety, agreed to execute a bond to *P. C. Bruce, G. Simson*, and *G. Taylor*, in the manner and on the terms thereafter mentioned:—And the above written obligation was such, that if *John Cooke and Thomas Cooke*, their executors and administrators, should well and truly remit to *P. C. Bruce, G. Simson*, and *G. Taylor*, and every of them associated or not as aforesaid, the amount of all and every such sums of money as they the said *John Cooke and Thomas Cooke*, or either of them, or any other person authorized by them or either of them, should or might draw on *P. C. Bruce, G. Simson*, and *G. Taylor*, or any of them, associated or otherwise as aforesaid respectively, or made payable at their house, as and when the same bills and notes should respectively become due, &c. &c. &c. then, and in such case, the obligation was to be void." It appears to me, that the object of the two principal obligors in this bond, and the purpose for which the defendant's tutor became surety, was, to secure to the *London* house such advances as they might make to the *Sunderland* house, constituted as it then was of the two partners *John and Thomas Cooke*; and in order to carry the bond further, or extend its terms as against the surety, it ought most expressly to appear on the face of the instrument, that he intended or purposed to make himself liable, not only for that firm as then constituted, but also to render himself accountable for bills drawn by, or advances made to the survivor. It has been said, that the surety was to be liable in respect of all sums advanced to meet bills drawn by both the *Cookes* or either of them; and that, consequently, so long as the business continued in their hands, or either of them, he was liable in respect of any debt

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which either might contract with *Bruce & Co.*, as there was nothing in the condition which confined the surety's liability to debts contracted during the joint lives of the *Cookes*; but if such were his intention, why were not words to that effect introduced? *viz.* such as "at whatever time such bills shall have been drawn, whether during the partnership or afterwards, or on any account whatsoever." Without the introduction or addition of any such words, I think that those or "either of them," must be confined to the acts of either of the *Cookes*, during the existence of the co-partnership; and consequently, could have no effect after that period. If the bond had been meant to extend to acts of either of the *Cookes* beyond the term of the partnership, such intention should not only have appeared on the face of the instrument, but it should have been expressly stated that the responsibility of the surety was to be extended to the survivor of his principals, or that he understood it to be so at the time the bond was given. The surety might consider himself secure by relying on the character and integrity of the deceased *Thomas Cooke*, as long as he continued a partner; and that might have been one of his principal objects or motives for becoming a surety; and if he had been requested to have extended his liability beyond the life of the deceased partner, or be still answerable for advances made to *John Cooke* alone after the death of his brother, he might have refused to have done so; or he might have been willing to bind his representatives during the life of *Thomas Cooke*, but not afterwards, and not to make them chargeable until the decease of both.—The only remaining question is, whether, on the evidence adduced at the trial, any part of the balance due from *John* and *Thomas Cooke* at the time of the death of the latter was still unpaid, or remained undischarged. It has been admitted, that no rest or distinction was made in the accounts at that period; but the parties went on as if nothing had happened, and the subsequent remittances were car-

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ried to the account of the general balance; and it was proved, that the remittances made after the death of *Thomas Cooke* were more than sufficient to cover the balance then due. Now, it is an established principle, that if a debtor does not make a specific appropriation of a sum remitted to account at the time, and such account is continued as one general unbroken and consecutive account, the sum remitted must be taken as applicable to the liquidation of the earliest balance due from the debtor, and the creditor is bound so to appropriate it. That principle applies most forcibly to the present case, and it was for the interest of all parties, that the remittances, subsequently to the death of *Thomas Cooke*, should be applied first, in liquidation of the old balance; and more particularly so, as such balance, was to carry interest as against *John and Thomas Cooke*. As, therefore, it appears to me, that the remittances made, subsequently to the death of the latter, ought to have been first applied in liquidation of the old balance, or debt of the longest standing; and I think this rule must be made absolute, by reducing the verdict to one shilling damages.

Mr. Justice PARK.—I am of the same opinion, and if the date of the bond be considered, it is quite clear that the case of *Scott v. Allsop* cannot apply, as it was decided on the construction of the statute 48 Geo. 3, c. 149, which had not been passed, nor the stamp duty thereby required, imposed at the time the bond in question was executed. With respect to the material points as to the construction of the bond, it appears to me to be the evident intention of the parties to confine its operation to such sums as should be advanced by the obligees during the joint lives of *John and Thomas Cooke*; and although it has been said, that it must be taken to cover such advances at all times during the life of either of them, yet, it appears to me, that the parties themselves understood the distinction between an extended or confined liability at the time of the execu-

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tion of the instrument. The death of one of the obligees was not to affect the others, as they were empowered to make advances, whether they were associated with any other persons or not; but that expression is altogether omitted, when mention is made of the parties who are to draw on the obligees; so that when *Peareth*, as surety, consented to become liable for bills drawn by his principals *John and Thomas Cooke*, or either of them, the words "associated or not" having been entirely dropped or omitted, those "or either of them" can only apply to acts done by either of the *Cookes* during the continuance of their co-partnership. So the surety was to be liable to the amount of all such sums as his principals, or either of them, might draw on the obligees:—that must be taken to apply to bills drawn in their partnership character, and for the payment of which the surety was to be responsible. In *Weston v. Barton* (a), it was decided, that a bond given to five persons, to indemnify them or any of them, for advances made by them as bankers, did not extend to sums advanced after the decease of one of the five by the four survivors; and Sir *James Mansfield* there said (b), "that it resulted from the authority of all decided cases, that where one of the obligees dies, the security is at an end; that it was not necessary to enter into the reasons of those decisions, but that there might be very good reasons for such a construction; as it was very probable that sureties might be induced to enter into such a security, by a confidence which they reposed in the integrity, diligence, caution, and accuracy, of one or two of the partners: that in the nature of things, there cannot be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest, and it may be, that the partner dying or going out may be the very person on whom the sureties relied; it would, therefore, be

(a) 4 Tunt. 678.—(b) *Id.* 682.

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very unreasonable to hold the surety to his contract, after such change."—That observation applies much more forcibly, or even in a tenfold degree, where the confidence reposed is with reference to the contracting of debts by several obligors. If for instance, a father and son are connected in partnership, the former alone might be in affluent or sufficient circumstances; it is very natural to suppose, that a surety might be willing to become responsible for him; but might hesitate to do so for the son alone; or, in other terms, that he would depend entirely upon the father during the continuance of the partnership.—With respect to the question as to the appropriation of the several sums remitted by *John Cooke*, after the death of his brother *Thomas*, this case differs materially from that of *Simson v. Ingham*, as there the obligors were bound, whether the firm should be changed, or they should be associated with any other person or not. There, too, there was a rest and settlement of the accounts; and the Court merely decided, that there could not be a complete appropriation until a communication had been made to the party who was to be affected by it: but, even from that case, it appears, that in the absence of any specific appropriation, the sums remitted after the rest in the accounts, ought first to be applied in liquidation of the old balance. And here, it appears, that remittances were made after the death of *Thomas Cooke*, which were more than sufficient to pay the balance then due; so that on the whole, it appears to me, that the rule for reducing the damages to one shilling, must be made absolute.

Mr. Justice BURROUGH.—There is no ground whatever as to the application for a nonsuit, on the insufficiency of the stamp. If the objection were tenable, the statute 48 Geo. 3, c. 149, would have been altogether unnecessary; and which was passed for the express purpose of meeting an instrument of this description. With respect to the construction of the bond, if I had thought at *Nisi*

Præsumptum as I now do, I should have entertained no doubt whatever upon it, for the condition is in the nature of a contract between the principal obligors and obligees, in their respective characters of bankers, and for the performance of which, the former were to be liable to the latter, whether they were associated with any other persons or not, either in the same or any other firm of business. It was not intended to provide for debts contracted after the death of one of the principal obligors, but the surety was only to be liable for such sums as should be advanced to meet bills drawn by them during their co-partnership; for the condition in terms is, that if they, *viz. John and Thomas Cooke*, or either of them, their executors and administrators, should remit to the obligees the amount of all such sums as the two *Cookes*, or either of them should draw, then the bond was to be void. It therefore appears to me to be the obvious meaning of the parties, that the surety was to be liable only during the continuance of the partnership for the amount of bills drawn by both of the partners, or one or either of them; and if he were to continue liable after the death of one, the condition ought to have been more explicit in terms.—I entertain no doubt whatever as to the appropriation of the sums remitted after the death of *Thomas Cooke*, as they ought to have been first applied in reduction of the balance then due. The rule therefore for reducing the damages, and entering a verdict for the plaintiff for one shilling only, must be made

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Tuesday,
Feb. 10th.

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Where the defendant, on being served with a rule of Court, requiring him to reinstate the plaintiff's premises forthwith, said, that he could not begin to set about it for three months; and an attachment against him was moved for, four days after such service, on the ground that he had not then commenced to comply with the terms of the rule, the Court directed the attachment to issue, although it was sworn that it would have required three months to complete the reinstatement of the premises, from the time of the service of the rule.

Mr. Serjeant Peake, having on the 6th instant obtained a rule to shew cause why a writ of attachment of contempt should not be issued against the defendant, for disobedience of a rule or order of this Court, requiring him, at his own expense, to reinstate the plaintiff's premises forthwith, and in respect of which the present action was brought, on an affidavit, which stated, that the plaintiff had authorized a person under a power of attorney to make a demand on the defendant, to comply with the terms of the order; and that such person, on the 2d instant, accordingly, personally served the defendant with a copy of the order or rule of Court, and at the same time produced and shewed him the original, and power of attorney, and also demanded the defendant to reinstate the premises forthwith; where he said, that he could not begin to set about it for three months. It was also sworn, that he had done nothing in pursuance of the order, nor taken any steps to comply with it at the time of the application for the attachment, or since, although eight days had elapsed since the service and demand had been made.

Mr. Serjeant Vaughan and **Mr. Serjeant Tiddy** now shewed cause, on affidavits of the defendant and his surveyor, who stated, that from the time of the service and demand, it would require three months at least to effect the reinstatement of the premises, as the wall could not be rebuilt on the spot where it originally stood, without violating the 55th section of the building act; and it was therefore submitted, that the attachment ought not to have been moved for, until the expiration of that period, from which alone the defendant could be considered as having been guilty of a contempt; and although he stated that he could not begin to set about the work, yet no reasonable

time had been allowed him for that purpose since the demand; and if a party be called on to pay money on a certain day, no attachment can be issued against him until that day has passed, although he might have said at the time of the demand, that he never would pay the sum demanded.

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Lord Chief Justice GIFFORD.—The application for the attachment in this case, was not made on the ground that the defendant had not completed the reinstatement of the plaintiff's premises, but because he refused to set about it altogether, and he had not even made a beginning, or done any thing in pursuance of the order, from the time of the demand and service, to the day of the application for the attachment. If he had even evinced an intention, or shewed a disposition to make a commencement, the case might have been different; or if he had been prevented from so doing by the inclemency of the weather, or any other sufficient cause, it might have been an answer to this application. But the defendant, either through perverseness or ill advice, supposes that by reinstating the plaintiff's premises, he is merely bound to set up what he has improperly pulled down. But, if a person pull down his neighbour's wall, and it is necessary that another shall be erected in its stead according to the provisions of the building act, it must be so done; and the plaintiff in this case is not to suffer, because the wall cannot be rebuilt or placed in its former state, without putting the defendant to an additional expense, in consequence of the provisions of an act of parliament being required to be complied with. The plaintiff is entitled to have his premises restored to their former state, whatever expense may be incurred by the defendant in so doing. The Court is called on to decide according to the law and justice of the case, and cannot be influenced by party feeling, and although it has been said, that the defendant has not had sufficient time

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of the capital offence, in case he had been brought before them and tried on an indictment on a criminal charge. The jury found a verdict for the plaintiff, damages 1918*l.*, being the value of the goods as sworn to have been on the premises at the time of the fire.

Mr. Serjeant Taddy in the last Term applied for a rule nisi, that this verdict might be set aside and a new trial granted, on three grounds: *First*, a misdirection of the learned Judge to the jury; *Secondly*, that the plaintiff's witnesses had been guilty of perjury; and affidavits were produced to shew, that true bills had been found by the grand jury of *Middlesex* against the plaintiff, his brother, and several others, for a conspiracy to defraud the fire-office of the sum insured, and sought to be recovered by this action; and *lastly*, that from the publicity which had been given to the proceedings at the trial, a respectable warehouseman who had seen the nature of the evidence in the newspapers, as well as a person by the name of *Hunt*, who, together with the plaintiff's brother, was a prisoner in *Hertford* gaol on a charge of murder, had voluntarily come forward, and disclosed upon oath, facts which would clearly prove that the plaintiff's demand had been supported by unparalleled and pre-concerted fraud, with respect to the goods alleged to have been burnt:—and other affidavits were produced, stating that scarcely any of the goods were on the premises at the time of the fire; but that they had been re-sold and delivered to the respective purchasers, with an express view to the accomplishment of this particular fraud on the insurance office. The learned Serjeant, in support of the *first* ground, submitted, that the learned Judge had laid it down too broadly to the jury, in stating that they should entertain the same certainty with respect to the plaintiff's guilt as would justify them in convicting him on a criminal charge; for that in a civil action of this description, it was fully competent to the jury to decide on the balance of probabilities

given in evidence, as in any other case where they would be warranted in finding against the plaintiff, if he failed to make out his claim to their satisfaction, although arson might not have been proved against him: for if the loss had been occasioned by the gross negligence of the plaintiff or his servants, unaccompanied with guilt, the defendant would have been entitled to a verdict; as in *Bell v. Carstairs (a)*, where a neutral ship was condemned from the want of necessary documents to entitle her to the privileges of her national character; it was held that the underwriter was not liable, although there was no express warranty of such character; the neglect of the ship owners themselves, who were bound at their peril to provide proper national documents for their ship, being in such a case the efficient cause of the loss. *Secondly*, as bills had been found against the plaintiff and others for a conspiracy to defraud the fire-office since the trial, added to the imputation of perjury to the plaintiff's witnesses, was of itself sufficient to send the cause down to be re-tried; and *lastly*, as the affidavits in support of the fraudulent conduct of the plaintiff, disclosed facts of which the defendant could have had no knowledge at the trial, he was in effect taken by surprise, and was consequently entitled to a new trial.

The Court were clearly of opinion, that the directions of the learned Judge to the jury were perfectly correct, as the question for their consideration was, whether the plaintiff had set fire to his premises or not; and the defendant relied on the fact of his having wilfully or *intentionally* done so, which, in point of principle, embraced the same question, as if he had been put on his trial on the charge of arson.—With respect to the objection as to bills having been found against the plaintiff and others, to defraud the office, and perjury in the plaintiff's witnesses,

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(a) 14 East, 374.

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there appear to have been many applications for new trials, on the suggestion that such facts have existed, but in none of which the party applying appears to have succeeded. In the *Cricklade* cases, of *Benfield v. Petrie* and *Petrie v. Milles*(a), where the ground of the motion was, that a bill of indictment had been found for perjury against the principal witnesses, Lord *Mansfield* said, "that the granting a rule for a new trial for such a reason, would have a most alarming and dangerous tendency, as it would open a door for constant scenes of perjury, and tempt a party to cause execution to be delayed by indicting his adversary's witnesses. So, in *Warwick v. Bruce*(b), where a rule was obtained for staying execution upon a judgment, until the trial of an indictment for perjury against two of the plaintiff's witnesses in the action, the Court ordered the rule to be discharged with costs; and in *Bartlett v. Pickersgill*(c), Lord Keeper *Henley* refused a plaintiff leave to file a supplemental bill in the nature of a bill of review, in consequence of a conviction of the defendant in the original proceeding for perjury, which conviction was obtained on the evidence of the plaintiff in the suit, as well as of other witnesses. And in the late case of *The Attorney General v. Woodhead*(d), the Court of *Exchequer*, after verdict, refused to arrest a judgment, on an affidavit, that a bill had been found against a witness indicted for perjury on a material point of evidence given by him at the trial; and Lord Chief Baron *Thomson* there said, that "it would be pregnant with the greatest mischief, if even a conviction of perjury on evidence given by a witness were to be received in answer to a verdict."

The rule was accordingly limited to the latter ground

(a) M. T. 22 Geo. 3, K. B. 2 Tidd, 7th edit. 914. — (b) 4 Mau. & Selw. 140. — (c) 1 Eden's Cas. Chan. 515. S. C. 4 East, 577. note. — (d) 2 Price, 3.

only, *viz.* the affidavits of the warehouseman and *Hunt*, and granted on the terms of the defendant's withdrawing the affidavits relative to the perjury of the plaintiff's witnesses and the conspiracy, and on payment of costs.

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Mr. Serjeant *Vaughan* and Mr. Serjeant *Pell*, in the course of this Term, shewed cause on affidavits, tending in substance to contradict those filed on behalf of the defendant; and they submitted, that as those of the plaintiff's brother and *Hunt* were principally relied on by the defendant, they should be received with great caution, or perhaps were entitled to no weight whatever, under the circumstances in which they were then placed. The learned Judge who tried the cause has not expressed himself to be dissatisfied with the verdict, and it has not even been inferred that it was against the weight of evidence; and although the plaintiff might have been guilty of one crime, it does not follow that he was implicated in the transaction with which he is now charged. Neither can a new trial be granted on the ground of surprise, as the defendant had an opportunity of enquiring into all the facts relative to the fire previously to the trial; and the plaintiff could have no interest in the result, as the policy had been deposited with his creditors, and as it was proved that the goods were purchased and sent to the premises the day preceding the fire, and no evidence was offered to shew that they had been removed, the plaintiff was most clearly entitled to recover; and more especially so, as some part of them were found in nearly a consumed state on removing the rubbish after the fire, and it must therefore be now assumed by the finding of the jury, not only that the goods were on the premises, but that they were not wilfully set fire to. It is evident, that if the cause goes down to be re-tried, there cannot be a fair and impartial trial, after the circumstances which have transpired respecting the murder in *Hertfordshire*, and it is not enough

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for the Court to grant the present application on mere collateral circumstances, which have been made known since the trial, and which the defendant has thought proper to obtain from witnesses of such doubtful and disreputable characters.

Mr. Serjeant *Taddy* and Mr. Serjeant *Cross* in support of the rule, contended, that as it now appeared that the fire had been produced by means which the defendant could not possibly have ascertained, either previously to or at the time of the trial, although he had every reason then to suspect them, and as he had since been made acquainted with the plaintiff's fraudulent conduct, the defendant was entitled to have the circumstances of the case fully investigated and the fraud unravelled; and more especially so, as it appeared that the plaintiff's brother had acted as his agent, and it should have been satisfactorily shewn that the fire was attributable to accident alone. The defendant could not know that the goods sent in had been removed, or re-sold previously to the fire, for the express view of the accomplishment of this fraud; and there could consequently be no inference drawn or presumption raised for what purpose the premises might have been set on fire. As, therefore, the circumstances attending the fire, as well as the motives of the plaintiff in the destruction of the premises, have been discovered since the trial, as well as various other fraudulent transactions between him and the persons with whom he was in the habit of dealing; the defendant is clearly entitled to a new trial, when every fact and circumstance attending the fire may be investigated and fully ascertained.

The Court took time to consider until this day:—when,

Lord Chief Justice GIFFORD, after fully detailing the facts, as well as the evidence adduced at the trial, the affidavits in

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support of the motion, and those filed in answer, observed, that, although the application had been made in the first instance on the ground of perjury in the plaintiff's witnesses, and his having conspired with others to defraud the fire-office of the sum insured; that the Court had most properly refused to grant the rule on that point, as it would furnish a most dangerous precedent, that the finding of a bill of indictment for perjury or conspiracy, should form a ground for a new trial after investigation by a jury, and *before* conviction; and that this appears to have been the course adopted both at law and in equity, according to the cases of *Bartlett v. Pickersgill*, and *The Attorney-General v. Woodhead*.—It has been said, however, that facts have transpired since the trial, which might operate as a surprise on the defendant, as he was not then prepared to rebut them; and if they were fully and satisfactorily established, it might possibly induce the Court to order a new trial; but, even then we should proceed with the greatest possible caution, for it is highly dangerous, that a cause should be re-discussed before another jury, founded on circumstances which have transpired since the former trial, and which tend to falsify or contradict the facts there proved; and in the case of *Feiss v. Parkinson* (a), this Court refused to grant a new trial, on the mere affidavit of one party contradicting the witnesses on the other side. It is therefore necessary for the Court to look most anxiously at the only remaining ground on which the present application is founded, *viz.* the affidavits tending to impute fraud to the plaintiff; and considering the mode of proof, the relative situations of the parties, and the circumstances which have transpired since the last trial, even the names of the plaintiff and his associates might tend to excite a prejudice of which the minds of the Court must be wholly divested. And, however forcibly the arguments for the defendant might have been

(a) 4 Taunt. 640.

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put, still, it must be considered that the affidavits in support of his having been taken by surprise, are not founded on his own knowledge or representations; he must have been aware that the plaintiff was insolvent, and that any benefit to be derived from the policy, was to be divided among his creditors. It is not enough for a party to swear that it is probable that another has been guilty of fraud, or that, under certain circumstances, it may naturally be inferred, but it must be shewn to have existed in the most clear and satisfactory manner; and although it is stated that facts have come to the defendant's knowledge since the trial, disclosing wickedness and fraud in the plaintiff and others, still it is the duty of the Court to proceed with the greatest caution, and see that those facts are fully and substantially made out. It was insisted at the trial, that the goods were not on the premises at the time of the fire, and as that was one of the grounds of defence, as well as that the premises were wilfully set on fire, it cannot now be said to operate as a surprise on the defendant. Even if it did, it would be dangerous to grant a new trial; and more particularly so, when other evidence might have been adduced at the former trial. If a party neglects to call witnesses, the Court will not grant a new trial; if they might by any possibility have been called on the former trial, for if such an indulgence were granted, there would be no end to litigation. At all events, in this case there was conflicting testimony, and the defendant ought to have made enquiries of the plaintiff's neighbours at the time of the fire, as to how it originated, as well as the nature of the plaintiff's dealings, which might have been obtained from the persons who furnished him with goods: and although part of the property might have been removed, yet there is nothing to shew that the remainder was not on the premises at the time the fire happened. It must be observed, that when the application for the new trial was made, no objection was raised as to the verdict being against evidence; it must, therefore, be considered conclusive as to

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the loss of the goods by fire, as well as their amount or value. The plaintiff proved that he had made large purchases of goods the day previously to the fire; and that fact has not been attempted to be impeached since: the Court cannot act on a mere suspicion of their being removed; and although the defendant himself might have sworn to that fact, it must still be considered that he would be a party to the suit, and that his affidavit would not be sufficient, unless it were supported by other testimony. It does not appear, however, that any communication was made to the defendant with respect to the re-sale or removal of the goods, until after the plaintiff had obtained his verdict. Why did not the warehousemen communicate all he knew to the defendant in the first instance? The mode of the plaintiff's dealings, or his merely re-selling goods, are not of themselves sufficiently suspicious circumstances to induce the Court to send this cause down to be re-tried; and more particularly so, when the balance of evidence was in favour of the plaintiff on the former trial.—On the whole, therefore, the Court having duly considered the particular circumstances of this case, the relative situations of the parties, the whole of the evidence adduced at the trial, and the affidavits which have been since filed in support of and against the motion, are clearly of opinion, that there is no sufficient ground for granting a new trial; and although the parties may be ultimately convicted for a conspiracy in endeavouring to defraud the fire-office, it will not induce us to suspend our judgment; for even if some of the plaintiff's witnesses had been indicted for perjury, it might prejudice the minds of the jury, although they had not been tried or convicted; and the bills for the conspiracy should not have been filed until the question between the parties in this cause had been fully set at rest. We are therefore clearly of opinion, that this rule must be

Discharged.

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Where a ship was so far injured by a storm, that it was found, on survey, at a foreign port, that the expenses of repairing her would exceed her original value, and the captain sold her *bonâ fide*, and for the benefit of all concerned, and the purchasers shortly afterwards broke her up: Held, that this was such a case of urgent necessity, as to justify the sale. In an action on a policy on freight, at and from the termination of the vessel's outward voyage at *New South Wales* and *Van Diemens Land*, to her ports of discharge and loading in *India* and the *East Indian Islands*: Held, that the *Mauritius* was not in *India*, nor an *Indian Island*, within the terms of the policy:—But it was afterwards determined to be so.

THIS was an action of *assumpsit* on two policies of insurance, the first of which was dated on the 25th January, 1820, and effected on the ship *Neptune*, valued at £000*l.* on a voyage at and from *London* to *New South Wales* and *Van Diemens Land*, the *East Indies*, *East Indian Islands*, *Persia*, and elsewhere, as well on this as at and on the other side of the *Cape of Good Hope*, with liberty to trade backwards and forwards, and to touch, stay and trade at and off all ports and places whatsoever and where-soever, and for any purposes whatsoever, until her arrival at her last station of discharging her homeward cargo in *Europe*. The second policy was dated on the 16th January, 1821, and effected on the freight of the same ship, valued at 4000*l.* at and from the termination of her outward voyage at *New South Wales* and *Van Diemens Land*, to her port or ports of discharge and loading in *India* and the *East Indian Islands*, during her stay and loading there, and from thence to her port or ports of discharge in *Europe*. The defendant pleaded the general issue.

At the trial, before Mr. Justice *Burrough*, at *Guildhall*, at the adjourned sittings after the last Trinity Term, the plaintiff called several witnesses, who proved that the *Neptune* sailed from *England* in the beginning of the year 1820, with convicts for *New South Wales*, she having previously undergone a survey by the Government officers appointed for that purpose, and declared by them to be perfectly capable of performing the voyage; that she reached *New South Wales* in a perfectly sea-worthy state, and having discharged her convicts there, she sailed to *Surabaya*, where she took in a cargo of rice, which she carried to the Island of *Mauritius*, and discharged it there. The rice was found to be perfectly free from damage, and

on a survey being had, the ship's bottom was found to be perfectly dry, and she appeared sound, and was reported to be in every respect sea-worthy. Having taken in a cargo at the *Mauritius*, consisting of sugar, cotton and cloves, she on the 31st July, 1821, sailed from *Port Louis*, in that island, on her homeward voyage to *London*. From the 14th August until the 7th September the *Neptune* encountered a succession of storms and gales, and on the 8th she arrived at *Symond's Bay*; but when she neared that port she was in a state of the greatest distress, and making from two to three feet water per hour, and her main topsail was completely shivered. By the assistance of the inhabitants she was brought into port, and immediately surveyed, but the extent of her damage could not be ascertained, as she had a full cargo on board. She was consequently unloaded, and underwent a second survey, when it was recommended by the surveyors employed, as well as by an agent of *Lloyd's*, to whom the captain had applied for advice, that the vessel should be sold, as the expence of repairing her would exceed her original value. The captain, acting under this advice, and being unacquainted with the insurance effected on her, sold her and some part of the cargo which had been damaged, for 5000 dollars, and trans-shipped the remainder of the cargo to *London*. No estimate of the expence of repairing her was given in evidence, but it was proved that there were no docks at the *Mauritius* where she could be repaired; but it appeared that the persons who had purchased the vessel on speculation, taking an opportunity of fine weather, after a month had elapsed, brought her round to *Table Bay*, where she might have been completely repaired. But on its being ascertained, from the great damage she had sustained, that such repairs were not advisable, she was there broken up.—For the defendant, it was contended, with regard to the policy on the ship, that the captain ought to have repaired her at any expense less than the sum for

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which she was insured, and that the defendant was at all events entitled to a verdict on the second policy on freight, as the *Mauritius* could not be considered an *East Indian* island within the terms of the policy; to prove which, he called the hydrographer of the *East India Company*, who stated, that he apprehended, geographically speaking, that the *Mauritius* must be considered as an *African Island*, belonging to the *Madagascar Archipelago*; that it was so reputed by the inhabitants, and that it was unconnected with the *East India Company's* Government. The plaintiff's witnesses however had previously stated, on cross-examination, that they considered the *Mauritius* to be an *East Indian Island*, and that it was generally taken to be so. The learned Judge left it to the jury to say, whether they thought the captain was justified in selling the vessel under the existing circumstances at the time of such sale, as proved before them; and he told them, that if they thought the sale arose from urgent necessity, the captain had a right to dispose of the vessel as he did, and that consequently the plaintiff would be entitled to a verdict on the policy on the ship. He also left it to them to judge, upon the evidence adduced for the plaintiff and defendant, whether the *Mauritius* was an *Indian Island* or not within the terms of the policy on freight, which he observed must be considered as having reference to the first, as it was intended to cover the same voyage, or, in other terms, to operate as an extension of the first policy on the ship. The jury found a general verdict for the plaintiff on both policies.

Mr. Serjeant *Vaughan*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the grounds, *First*, That under the circumstances, the captain was not authorized in selling the ship at the *Cape*, so as to throw the loss on the underwriters; as although the repairs might have exceeded her cost price, still that as she was valued at and insured for 8000*l.*, if

she could have been repaired at all, it was the captain's duty to have done so. *Secondly*, That with respect to the policy on freight, the risk had never attached, as the cargo was loaded at the *Mauritius*, which was not in *India*, nor did it fall within the description of an *East Indian Island*, as described in the policy.

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Mr. Serjeant *Pell*, on a former day in this Term, shewed cause, and submitted that this case was distinguishable in circumstances from all those which had preceded it; and in which it had been decided, that the captain of a ship in a foreign port is not justified in selling her, except in cases of extreme or the most urgent necessity, as, in all those cases, the vessels had been repaired by the purchasers after the sale, and brought home full cargoes; whilst here, the purchasers, after having taken the trouble to get the vessel round to *Table Bay*, with an intent to repair her, found it totally impracticable to do so, and she was consequently broken up there. It appeared too, that at the time of the sale the captain did not know that an insurance had been effected, either on the ship or freight, and he therefore acted, as he conceived, for the benefit of his owners, whom he believed to be the only persons interested; and as on two different surveys, it appeared that the expense of the repairs would have amounted to more than the original cost of the vessel, and the sale was recommended by the persons who surveyed her, as well as an agent of *Lloyd's*, to whom the captain applied for advice in the first instance, it is quite clear that the sale was not only *bond fide*, but justified by the extreme necessity of the case. At all events it was a question for the jury to decide, from all the facts adduced in evidence before them; and as they considered that the captain was fully warranted in the sale, their verdict cannot be disturbed with respect to the policy on the ship.—As to the objection raised to the second policy on freight, respecting the situation of the island of

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Mauritius, there was only one witness called for the defendant, who apprehended, that in physical geography it must be considered as an *African Island*, and belonging to the *Madagascar Archipelago*. But the plaintiff's witnesses had previously stated that they always considered it to be an *Indian Island*, and such general reputation is supported by the opinions of various writers. In *Mallam's Naval Gazetteer* it is described thus, "*Mauritius*," an island in the *East Indian Ocean*, called by some the *Isle of France*. In *Crutwell's Gazetteer* it is described, "*France*," *Isle of*, an island in the *Indian Ocean*. In *Walker's Gazetteer*, "*France*," *Isle of*, or *Mauritius*, an island in the *Indian Ocean*, and in *Brooker's Gazetteer* it is described as "*Mauritius*," an island in the *Indian Ocean*, four hundred miles east of *Madagascar*. All these writers support the opinion of the plaintiff's witnesses at the trial; and at all events, as there was conflicting testimony on this point, the jury having heard and weighed the whole of the evidence respecting it, were fully warranted in considering the *Mauritius*, in point of locality and general reputation, as an *East Indian Island*; and if so, their verdict is conclusive and cannot be disturbed.

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Taddy*, in support of the rule, contended, that the sale was not warranted under the circumstances, and that a captain can only be justified in selling a vessel in a foreign port in a case of absolute or imperative necessity, and not on mere expediency, or according to the best of his judgment. It is not enough that a sale is made *bond fide*, and with an honest and just intent, or for the benefit of all concerned, but it must also be shewn that the necessity was extreme and inevitable. In the cases of *Reid v. Darby* (a), *The Gratitude* (b), *Idle v. The Royal Exchange Assurance* (c),

(a) 10 East, 143. (b) 3 Rob. Adm. Rep. 240. (c) 3 B. Moore, 115-

Read v. Bonham (a), and *Meaburn v. Leckie* (b), this subject has been completely exhausted; and in the latter case, Lord Chief Justice *Dallas* asked, "What is extreme necessity? It is not sufficient that the captain, in his opinion, judged it to be so." And in *Read v. Bonham*, Mr. Justice *Richardson* said, that "as to the necessity of a sale, it is quite clear that a master has no authority to sell, except in a case of extreme or absolute necessity, viz. in the greatest or almost insurmountable difficulties, or at all events, as would induce a prudent man so to act, in case the vessel were not insured." Here, however, it appears that no such necessity existed in point of fact, as the ship might have been completely repaired at *Table Bay*, where she was taken by the purchasers, and although the expense of her repairs there might have exceeded her prime cost, still, as the value put upon her by the plaintiff in the policy was 8000*l.* she ought to have been repaired at any expense *minus* that sum, as the plaintiff ought to be bound by his own valuation, and in that case he would have been entitled to claim his loss from the underwriters, the policy being in the nature of a contract of indemnity, which was materially altered by the sale, as the risk was thereby entirely put an end to, and which enabled the plaintiff to claim as for a total loss. Besides, no estimate of the expense of the repairs appears to have been made, and therefore it does not follow that such expense would even have amounted to the original cost of the vessel.—As to the second policy on freight, it may be considered as wholly distinct from the first, not only as a year had intervened between the days on which they were effected, but they were different not only in value but in terms, and the risk insured against in the latter, was from the termination of the out-

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(a) 6 B. Moore, 397.—(b) Not reported, but tried before Lord Chief Justice *Dallas*, at *Guildhall*, at the sittings after Hilary Term, 1821.

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ward voyage to the vessel's ports of discharge and loading, and during her stay in *India* and the *East Indian Islands*; and from thence to her final port of discharge in *Europe*; and although it has been contended that the *Mauritius* is an *Indian Island*, and different authorities have been cited to prove that fact, still it must be considered that it is only four hundred miles distant from *Madagascar*, whilst it is at least two thousand from the *East Indies*; and although it is now subject to our Government, it does not form any part of the *East Indian* dependencies, and licences to trade there are different from those granted to the *Indian Islands*, as in the one case they are granted by the Crown, and in the other they must be obtained from the *East India Company*. And although various gazetteers have been cited to shew that the *Mauritius* is an *Indian Island*, they are opposed by the *Encyclopædia* in which it is termed an *African Island*, and in the French work of *Paul et Virginie* it is described as being situate in *Africa*. As well, therefore, from its local or geographical situation, as on authority, and the want of jurisdiction of the *East India Company*, it must be considered as an *African* and not an *East Indian Island*; and if so, the risk on the policy on freight never attached, as the cargo was loaded at the *Mauritius*, and the defendant is consequently entitled to a verdict.

Cur. adv. vult.

Lord Chief Justice GIFFORD now delivered the judgment of the Court as follows: This was an action on two policies of insurance, one of which was dated on the 25th January, 1820, and effected on the ship *Neptune*, valued at 8000*l.*, for a voyage at and from *London* to *New South Wales*, *Van Dieman's Land*, the *East Indies*, the *East Indian Islands*, *Persia*, and elsewhere, with liberty to touch and call at all ports and places on this or the other side of the *Cape of Good Hope*, until her arrival at her final port of discharge in *Europe*. The second policy was effect-

ed on the freight of that ship, dated on the 16th *January*, 1821, and effected for the sum of 4000*l.*, and the risk was to commence at and from the termination of her outward voyage at *New South Wales* and *Van Diemens Land*, to her port or ports of discharge and loading in *India* and the *East Indian Islands*, and during her stay and loading there, and from thence to her final port or ports of discharge in *Europe*. A general verdict has been found for the plaintiff on both these policies, and a rule nisi has been obtained for setting it aside, and that a new trial might be granted on two objections only, and both of which were taken at the trial. The *first* is, that the vessel ought to have been repaired and not sold; and *secondly*, with respect to the insurance on freight, that the risk in the second policy did not attach, as the cargo was not shipped at the *East Indies*, or an *East Indian Island*, but at the *Mauritius*.—With respect to the first objection as to the ship, *viz.* that the captain who sold her at the *Cape of Good Hope*, was not justified in so doing; but that she should have been repaired, as she was afterwards brought round by the purchasers to *Table Bay*. It is unnecessary to enter into a minute investigation of the several cases which have been already decided on this subject, as most of them are of recent occurrence, and must consequently be in the perfect recollection of the Court; and those of *Reid v. Darby*, the case of the *Gratitude*, *Idle v. The Royal Exchange Assurance Company*, and *Read v. Bonham*, have established the principle, that in order to justify the sale of a ship by the master, a case of urgent or extreme necessity must exist, and it must be made *bonâ fide*, and for the benefit of all concerned, and the existence of such necessity must be strictly ascertained and adhered to. The Court are extremely anxious that it should be fully understood, that nothing can now affect or impeach the correctness of that principle. But the

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only question now is, did the facts and circumstances of this case, as given in evidence at the trial, establish the existence of such an urgent necessity, and that the sale was effected for the benefit of all concerned. The jury, who were special, have determined that it was, and after having heard the notes of the learned Judge who tried the cause, and the arguments which have been adduced in support of and against the verdict, I am clearly of opinion that the jury came to a right conclusion; and consequently, that their verdict was fully warranted by the evidence before them, as far as regards the sale of the ship. It appeared, that at the time she left the *Mauritius* she was perfectly sea-worthy, and complete in every respect for the purpose of the homeward voyage; that after she had taken in her cargo there, and before she reached the *Cape*, she encountered a heavy gale, which continued incessantly until her arrival at *Symond's Bay*, which she succeeded in making with the utmost difficulty, and when she neared that port she was in such a state, that the captain was obliged to fire guns of distress. On her being brought into that port, through the assistance of the inhabitants, she was immediately surveyed, but the extent of her damage could not be ascertained, as she had a full cargo on board; she was consequently unloaded and surveyed a second time by carpenters and surveyors, when it was ascertained that it was impossible to repair her at *Symond's Bay*. The captain then applied to an agent of *Lloyd's* there for advice, and he as well as the surveyors concurred in thinking that it would be beneficial, and for the interest of all concerned that the vessel should be sold, which was accordingly done. The purchasers, after a month had elapsed, succeeded in bringing her round to *Table Bay*, where she might have been repaired; but finding from her disabled state that it was unadvisable to do so, they broke her up. These facts were fully proved by a carpenter who was at the *Cape* at the time, and who swore,

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that it appeared to him that the expence of repairing her would be equal to, or even exceed her original cost. On these facts before them, the jury found that a case of urgent necessity had been made out. It has not been disputed that the sale was not made *bond fide*, and it is quite clear that under the circumstances it was for the benefit of all concerned. It also appeared by the evidence of the captain, that he was ignorant of the insurance at the time of the sale. It therefore appears to us, that the jury have formed a right conclusion, as far as regards the sale of the ship. Still, however, we agree with the argument for the defendant, that it is not sufficient to shew that the sale was *bond fide*, and for the benefit of all concerned, as if it took place under an error of judgment the underwriter would not be liable; but it must be also shewn that there was an urgent necessity for such sale; and as such necessity was satisfactorily proved to have existed in the present instance, the verdict in that respect cannot be disturbed.—With respect to the policy on freight, as the risk attached from the termination of the outward voyage at *New South Wales* to her ports of discharge and loading in the *East Indies* and the *East Indian Islands*; it was incumbent on the plaintiff to prove that the *Mauritius* was in *India*, or an *East Indian Island*, so as to bring it within the terms of the policy. There can be no doubt that, geographically considered, the *Mauritius* is not situate in *India*, nor among the *East Indian Islands*; and although the plaintiff's witnesses on cross-examination had stated, that it was generally considered as an *Indian Island*, yet a person who filled the situation of hydrographer at the *East India House*, and who was called for the defendant, stated, that it was an *Island* belonging to the *Madagascar Archipelago*, and, in physical geography, considered as belonging to *Africa*; and no direct evidence was offered by the plaintiff, to shew that the *Mauritius* in mercantile accep-

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tation was reputed or esteemed to be in *India*, or an *East Indian Island*; as, therefore, he failed to prove the commencement and duration of the risk as contemplated by the policy on freight, the verdict must be confined to the plaintiff on the policy on the ship, and a verdict must be entered for the defendant on the policy on freight; and on these terms the rule was ordered to be made

Absolute (a).

(a) See *Robertson v. Money*, 1 Ry. & Mood. N. P. C. 75, where, in an action by the plaintiff against another underwriter on the policy on freight, evidence was admitted to shew that the *Mauritius* was considered in mercantile contracts and insurances, as an *East Indian Island*, although treated by geographers as an *African Island*; and Lord Chief Justice Gifford, before whom the cause was tried, having left it to the jury to say, whether from the whole of the evidence the *Mauritius* was an *East Indian Island* within the meaning of the policy; they found that it was, and accordingly gave a verdict for the plaintiff. See also *Uhde v. Walters*, 3 Camp. 16.

Wednesday,
Feb. 11th.

RIDDELL, Plaintiff; NASH and Others Deforciant.

It seems that the affidavit of the acknowledgment of a fine taken at *Caen* in *Normandy*, cannot be sworn before the British consul resident there, the mayor having previously refused to take such affidavit, on the ground that the proceedings were not in the French language:—at all events, it must be shewn that there was no other magistrate at *Caen* than the mayor, before whom the affidavit might have been sworn.

MR. Serjeant *Lawes* moved that this fine might pass, although the affidavit of the acknowledgment of the consutors, which had been taken at *Caen*, in *Normandy*, had not been made or authenticated before a notary public or magistrate there. He founded his motion on an affidavit, which stated, that the necessary documents had been sent to *Caen* for the purpose of having the acknowledgment taken, and that an application was made to the mayor there, in the presence of a notary, who both declined to take an affidavit of the acknowledgment, as the proceedings were writ-

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ten in English, and not in the French language; on which the affidavit was sworn before the British consul resident at *Caen*. This the learned Serjeant submitted, was under the circumstances sufficient, and he referred to the case of *Domville*, demandant; *Kinderley*, tenant; *Collier*, vouchee (*a*), where an affidavit of the acknowledgment of a warrant of attorney for suffering a recovery, made before a British consul in a part of *India*, where there was neither a notary public nor magistrate, was held good.

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But the Court doubted whether the consul at *Caen*, was empowered to administer an oath; and held, that it was, at all events, incumbent on the parties to make an affidavit, that there was no other magistrate than the mayor resident there, before whom the affidavit of the acknowledgment might have been taken.

The application was accordingly refused.

(*a*) 3 Taunt. 275.

CANNAN and Others v. MEABURN and Another.

Thursday,
Feb. 12th.

THIS was an action on the case, and brought against the defendants as ship-owners, for a damage sustained by the plaintiffs, by the loss of goods laden on board the defendant's ship.

In an action on the case against ship-owners, to recover damages sustained by the loss of goods shipped on board their vessel, where the completion

At the trial, before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after *Michaelmas* Term, 1822, a verdict was found for the plaintiffs, damages 7000*l.*, subject to the

of the voyage was prevented by the improper sale of the ship by the captain abroad:—Held, that the value of the ship was to be calculated at the time of the sale, and not at the time of the commencement of the voyage, and that the owners were only liable for the amount of the freight which might have been earned if the vessel had completed her voyage, and not the amount of freight as calculated on at the time of its commencement.

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award of an arbitrator, who was to settle and ascertain the amount of the damages; and by the terms of the order of reference, the verdict was to be entered for such a sum as he should direct. The arbitrator by his award, ordered that the verdict should be reduced to the sum of 1600*l.*, and stated, that, inasmuch as several points of law had arisen in the course of the reference, on which it was agreed, that either of the parties might apply to have the opinion of this Court; he had thought it fit to state the circumstances of the case specially, for the purpose of enabling either of the parties so to do; and he further directed, that his award should be altered and made conformable to the opinion of the Court. The circumstances of the case, as set out by him upon the face of the award, were as follows:—This was an action upon the case brought by the plaintiffs, who had, by their agents in *Calcutta*, shipped seventy-two chests of indigo on board the *Lady Banks* in *Calcutta*, bound for *London*, against the defendants, the owners of that ship, whereof *Isaac Vallance* was the master. The declaration stated, that the plaintiffs, at the special instance and request of the defendants, delivered to them seventy-two chests of indigo of the value of 7000*l.*, to be carried by the defendants in and by a certain ship of theirs called the *Lady Banks*, from *Calcutta* aforesaid to *London* aforesaid, and there to be delivered to the said plaintiffs for certain freight to the said defendants in that behalf, the dangers and accidents of the seas and navigation, of what kind soever, save risk of boats so far as ships were liable thereto, excepted; and that the defendants received the same accordingly for the purposes aforesaid; and although no dangers and accidents of the seas or navigation of any kind whatsoever prevented the safe carriage and conveyance and delivery of the said goods and merchandize as aforesaid; that the defendants not regarding their duty in that behalf, did not nor would carry and convey the said goods and merchandizes from

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Calcutta aforesaid to *London*, but wholly neglected and declined so to do; and on the contrary thereof, they the said defendants wrongfully carried the said goods and merchandizes to the island of *Mauritius*, and there left the same, and the same have thereby become wholly lost to the plaintiffs.—The goods were shipped at *Calcutta* under a bill of lading in the usual form. The *Lady Banks* had when she sailed from *Calcutta*, a full cargo on board of sugar, saltpetre, indigo, and other articles, shipped on account of various persons who had agreed to pay certain freights in the bills of lading thereof mentioned, there being no charter-party or other contract for the voyage; and the arbitrator found, that the freight of all the goods so shipped would have amounted to the sum of 2000*l.*, if the goods had arrived in *London*, and been there delivered according to the terms of the different bills of lading. The ship sailed from *Calcutta* on the 21st *December*, 1820, and anchored in *Madras Roads* on the 29th of the same month, where she met with a gale of wind, from which she sustained considerable injury. She afterwards put into *Trincomalee*, in the island of *Ceylon*, to repair the damage she had sustained, and the captain there sold — bags of sugar, part of the cargo, and which belonged to the defendants. Part of the proceeds of the sugar were applied to the repairs of the vessel, and the remainder of such proceeds were remitted by the captain to the said defendants. The ship sailed from *Trincomalee* on the 17th *February*, and in the progress of her voyage, by tempestuous weather, became very leaky, and six hundred bags of sugar were necessarily thrown overboard, to enable her to reach a port of safety. The ship reached the *Mauritius* on the 24th *March*, in considerable distress, and with part of her cargo damaged. Soon after the arrival of the ship at the *Mauritius*, the captain petitioned the Vice Admiralty Court for a survey, and the cargo was discharged and deposited in warehouses. The whole of the cargo

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then on board the vessel, except one hundred and forty chests of indigo, and thirty casks of tallow, was deposited in one warehouse; and the said one hundred and forty chests of indigo, and thirty casks of tallow were deposited in another warehouse. A fire took place a few days after the cargo had been landed, which consumed the sugar, saltpetre, and all other parts of the cargo, except the one hundred and forty chests of indigo, and thirty casks of tallow. The ship was afterwards, without any knowledge or privity of the defendants, sold by public auction, after protest of abandonment by the captain, and she was repaired by the purchaser in the month of *July* following. The one hundred and forty chests of indigo, and the thirty casks of tallow, were afterwards also sold by public auction by the Registrar of the Vice Admiralty Court, without any knowledge or privity of the defendants. The action was brought to recover the value of seventy-two chests of indigo, part of the above one hundred and forty chests.

At the trial, it was contended on the part of the defendants, that as ship-owners, they were not bound to repair the ship, nor under the circumstances to forward the indigo and tallow by another vessel; and that they were not answerable for the acts of the captain after the sale of the ship, his authority as master having then ceased, and the sale of the remaining cargo being his own tortious act. The Chief Justice left it to the jury to consider, whether the ship ought to have been repaired, and whether the captain could have forwarded the goods by another vessel, and held that the defendants as owners, were answerable for the acts of the captain, if the ship could have been repaired, or the goods could have been transhipped. The jury found a verdict for the plaintiffs generally, and stated, that they found both of the above points in the affirmative. It was then agreed, that the amount of the damages which the plaintiffs were entitled to recover, should be settled by an arbitrator, as being within the statute 53

Geo. 3, c. 159. The defendants contended before the arbitrator, that under that statute, they were not liable beyond the value of the ship and freight, and upon this point he was of opinion, that they were correct. The next question that arose was, admitting the case to be within the statute, when was the value of the ship to be taken, whether at the time the cargo was first put on board her at *Calcutta*, or at the time the cause of action arose, *viz.* at the period the captain abandoned the voyage at the *Mauritius*, at which time, from the damage the ship had sustained, the value was considerably reduced? The arbitrator thought that the value, at the time when the plaintiff's cause of action arose by the abandonment of the voyage at the *Mauritius*, was the proper value, and he awarded accordingly, but stated, that if he were wrong, the verdict ought to be increased by the addition of 2500*l.* The remaining question was, as to the amount of the freight for which the owners of the ship were answerable, *viz.* whether the whole freight of the goods taken on board at *Calcutta*, or only the freight of the one hundred and forty chests of indigo, and thirty casks of tallow. The plaintiffs contended, that they were entitled to claim the freight of the whole cargo:—and the defendants, on the other hand, insisted, they were liable only to the extent of the freight of the one hundred and forty chests of indigo, and thirty casks of tallow; the arbitrator was of opinion, that the defendants were liable only to the extent of the freight of the one hundred and forty chests of indigo, and thirty casks of tallow, and he allowed to that extent only; but stated, that if he were wrong in this, then the damages ought to be increased by the further sum of 1900*l.*

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Mr. Serjeant *Lens*, having in the last *Trinity* Term obtained a rule *nisi*, that the damages for the plaintiffs might be increased, by adding the sum of 1900*l.* for the freight of the whole of the goods taken on board at *Cal-*

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cutta, as well as by the addition of the further sum of 2500*l.*, as to the value of the ship, according to the provisions contained in the award:—

Mr. Serjeant *Vaughan* on a former day in this Term, shewed cause, and submitted, that the only question depended on the construction to be put on the statute 53 Geo. 3, c. 159, the express object of which was, to limit the responsibility of ship-owners, and the first section provides in terms, that no owners or part owners *shall be liable* to make good any loss or damage to any goods or merchandize laden on board their ships, further than the value of their ship, and the freight due or to grow due for and during the voyage, provided such damage should be occasioned without their fault or privity. In the late case of *Wilson v. Dickson* (a), the Court of *King's Bench* expressly determined, that the value of the ship was to be calculated at the time of the loss, and not at the time of the commencement of the voyage; and Mr. Justice *Bayley*, in delivering a most elaborate judgment as to the construction of the statute in this respect, said (b), that, “upon the whole, it seemed to him, that the words ‘the value of his or their ship or vessel,’ must, unless there are some other words to control them, mean the existing value at the time when the loss takes place: that the mode of ascertaining that value was a matter of evidence, and might possibly be attended with some degree of difficulty.” The principle of that decision applies expressly, if not more forcibly, to the freight due or to grow due; and which consequently, can only apply in this case to freight due at the time of the happening of the loss, or the abandonment of the voyage at the *Mauritus*. So the freight to grow due must be the freight due at the completion of the voyage; and as it was unavoidably terminated at the *Mauritus*, no greater

(a) 2 Barn. & Ald. 2.—(b) *Id.* 15.

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freight could have been earned than that which would have arisen upon the delivery of the remaining part of the cargo in *London*, viz. the one hundred and forty chests of indigo, and thirty casks of tallow. The damages were therefore most properly confined by the arbitrator to that amount, nor can the plaintiffs be legally entitled to any further claim for freight. Although at common law, the defendants, as ship-owners, would have been accountable to the plaintiffs to the full extent of the actual loss sustained, yet the statute 53 *Geo. 3*, was passed for the purpose of amending the previous acts of the 7 *Geo. 2*, c. 15, and 26 *Geo. 3*, c. 86, and further for limiting the responsibility of ship-owners in certain cases, and more especially for the acts of their servants. If, however, the defendants as such owners are to be deemed liable to pay the freight of the whole cargo, they will not only be responsible beyond what is required by the law of any other country, but they will be called on to pay freight, which they can never receive. By the French Ordinance, although a ship-owner is liable for the acts of the master, yet he is to be discharged therefrom upon relinquishing the ship and freight, and the words "at the time of the happening of the loss or damage," as introduced in the latter part of the first section of the stat. 53 *Geo. 3*, and which were omitted in the former statutes, were intended by the legislature to have their full meaning and effect, and afford an additional remedy to ship-owners, by only rendering them responsible to the amount of their respective capitals embarked by them in their ships. According therefore to the plain interpretation of that statute, and the decision in the case of *Wilson v. Dickson*, the value of the ship must be calculated at the time of the loss; and that principle applies more strongly to freight, which must be considered as the proximate antecedent.

Mr. Serjeant *Taddy*, *contra*.—This case embraces a most

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important point, not only as affecting mercantile interests and the responsibility of ship-owners, but applies more particularly to all vessels trading to *India*. With respect to the value of the freight, it ought to be calculated at the sum contracted for at the time of the shipment or commencement of the voyage, and not at the time of the loss, for the shipper can only look at the state of the ship at the time of shipment, and he confides to that value only, as the fund to indemnify him against loss. Here, too, it must be observed, that there has been a *jet-tison*, in which case, all the property on board was liable to contribute on a general average to every one who has sustained a loss. The rule adopted by the *Rhodian* law, on which most writers have regarded the modern law of average to be founded, is this, "that, if goods are thrown over-board in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all (a)." Freight must contribute to general average, because it is preserved for the owners, as well as the cargo for the merchant. And in *Abbott on Shipping* (b), there is a statement of a general average account, in which the amount of the owner's freight of goods cast over-board is introduced; and that learned writer observes, that "he had included the freight of goods thrown over-board, which appeared to be proper, as the freight of these goods is to be paid, and their supposed value is taken clear of freight, as well as other charges." With respect to the sugar sold at *Ceylon*, as part of the proceeds was remitted to the defendants, it must be considered as if the goods themselves had arrived, and must consequently be brought into the freight account, and an estimation made from the port of loading to the place at which they were sold. But the amount of freight due on the voyage in prosecution, must be that which the ship might have earned if no peril had intervened, and to

(a) Holt on Shipping, Vol. II. 187.—(b) 4th Edit. 372.

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which it is quite clear the owners would be entitled to contribution on a general average, and if it were otherwise, the owner of a vessel might at any time get rid of his responsibility by fixing the time of his loss, and might tortiously throw either part or the whole of the cargo overboard at different periods, and then claim to be exempt from all charges on the score of freight; but in point of principle, such owner is liable to the extent of all the freight contracted for at the commencement of the voyage. With respect to the case of *Wilson v. Dickson*, the words "at the time of the loss happening," must be taken to refer to the ship only, and not to the freight; for with regard to the latter, the Court, in construing the statute 53 Geo. 3, did not confine themselves to the literal acceptance of the words "*grow due*;" but decided, that, in calculating the value of freight due, or to grow due, money actually paid in advance, or by way of anticipation, was to be included and taken into the account; and it cannot be contended for a moment, that money so paid and received ~~was due or to grow due~~ for the voyage. Here, however, the defendants are liable for what was charged on account of the freight contracted for at the commencement of the voyage. The obvious meaning of the statute is, that all the freight which is capable of being earned in the progress of the voyage shall be brought into account; and more particularly so, as in *Wilson v. Dickson*, part of the freight was paid the day the ship sailed, and therefore could not be considered as growing due, in the prosecution of the voyage; nor was it in fact ever due, because the goods were never conveyed to their place of destination. That the value of the freight is not to be estimated at the time of the loss, although the value of the ship might be, is evident from the second section of the statute 53 Geo. 3, which provides, "that the value of the carriage of any goods belonging to any owner of a vessel, and also the hire due or to grow due under any contract, except only such hire as in the case

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of a vessel hired for time, may not happen to be earned until the expiration of six calendar months after the happening of such loss, shall be considered as freight." Now, this clause would be altogether nugatory and useless, if the value of the freight were at all events to be estimated at the time of the loss. The legislature, therefore, had two objects in view, viz. the time of the loss, and the completion of the voyage; and as the defendants seek to protect themselves against a tortious act of their captain, committed by him at the *Mauritius*, and which must be considered as the act of the owners themselves, and which might have been done at any time in the prosecution of the voyage; although the greater part of the cargo was destroyed by fire there, it affords no excuse to the owners, nor does it tend to lessen their responsibility. On the construction of the statute 53 Geo. 3, therefore, as well as on policy and mercantile usage, the amount of the freight in this case must be calculated on at the commencement of the voyage, and not the amount which might have been earned in case it had been completed.

Cur. adv. vult.

Lord Chief Justice GIFFORD now delivered the judgment of the Court, and after stating the facts as set forth on the face of the award, proceeded as follows:—This was a motion to increase the damages awarded to the plaintiffs for a loss sustained by them by the destruction of goods on board a ship called the *Lady Banks*, and was made on the ground, that the arbitrator was mistaken in his view of the law, as far as regarded the questions raised before him as to the extent of the damages the plaintiffs were entitled to recover. As far as regards the ship, no question has been raised, as it has been conceded in the argument, that it is concluded by the decision of the Court of *King's Bench* in *Wilson v. Dickson*, by which the value of the ship must be estimated and taken at the time of the loss.

With respect to the freight, it has been contended, that, under the terms of the statute 53 *Geo. 3*, c. 159, the whole amount of the freight of the goods put on board in *India*, supposing they had arrived in *England*, is the true criterion by which the damages ought to be estimated and ascertained, and for which the defendants as ship-owners are liable. The statute 53 *Geo. 3*, was passed to amend two former acts, *viz.* 7 *Geo. 2*, c. 15, and 26 *Geo. 3*, c. 86, as well as to limit the responsibility of ship-owners in certain cases; and the first section enacts in terms, that no owners, or part-owners of any ship or vessel, shall be subject or liable to answer for, or make good any loss or damage arising by reason of any act, neglect, matter, or thing done, omitted, or occasioned, without the fault or privity of such owners, which may happen to any goods, wares, merchandizes, or other things, laden or put on board their own or any other ship, further than the value of their ship, and the freight due or *to grow* due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage." Now, under these latter words it has been contended, that the whole freight contracted for at the time of sailing, and which might have been earned if the ship had encountered no disaster, was freight growing due for and during the voyage which might be in prosecution; but the Court are of opinion, that the words "due or to grow due," must be intended to apply to such freight, which, under the circumstances, was earned, or might have been earned by the owners at the completion of the voyage in question, or, in other terms, the freight which might have accrued due during the prosecution of the voyage from the *Mauritius*; and, therefore, that the view which the arbitrator has taken in this respect is correct. It has been said, however, on the part of the plaintiffs, that, according to the words of the statute, a ship-owner is liable to the extent of all the freight contracted for, whether it be earned or not. That,

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however, does not appear to us to be the true construction of the statute, according to which, the owners in this case are only liable at the uttermost, to the extent of freight due (if any) when the ship arrived at the *Mauritius*, or to freight which might have accrued or grown due during the further prosecution of the voyage, if the ship had been repaired there. That was the only freight *growing due* for the voyage within the meaning of the statute, and this construction of it is confirmed by the opinion of Mr. Justice *Bayley*, in delivering his judgment in the case of *Wilson v. Dickson*. But it has been further contended in this case, that, as by the second section of the statute, "the value of the carriage of any goods belonging to the owner of the ship, and also the hire due or to grow due, except only such hire as in the case of a ship hired for time may not begin to be earned until the expiration of six calendar months, after the happening of such loss or damage, shall be deemed and taken to be and considered as freight within the intent and meaning, and for the purposes of the act," there having been goods on board, the property of the owners, which were sold at *Trincomulee* for the purpose of repairing the vessel, and the residue or remainder of the proceeds was remitted home to the owners, that the arbitrator should have found what was the value of the carriage of those goods from *India* to *Ceylon*, and that he ought to have added it to the freight which he has found to be due to the plaintiffs. No such question appears to have been raised before the arbitrator, nor can we now presume that it was, from any of the facts as stated in his award. The only questions that appear to have arisen before him, seem to have been confined to the value of the ship, and amount of freight to which the owners were responsible; and therefore, the Court are not called on to give any opinion as to whether the arbitrator ought to have estimated the freight of those goods from the port of loading to the place at which they were sold. Assuming, however, for a mo-

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ment, that this question had arisen and been discussed before the arbitrator, we think he would have done right in not estimating the freight on the proceeds of goods so sold, and that the principle laid down by the Court of *King's Bench* in *Hunter v. Prinsep* (a), is applicable to this point, where it was held, that goods having been tortiously sold out of a ship before they reached their destination, the ship-owners were not entitled to freight *pro rata itineris*, although the proceeds arising from the sale of the goods came to the hands of the consignees. Here, it is clear, that if the ship had been brought to this country, the owners would have been entitled to freight; so, if the consignees had received the goods, although they had been brought home in another ship, they would still be liable to freight; for whenever goods are brought to their place of destination, their owners are liable for the carriage of them in the nature of freight; and Lord *Ellenborough* in *Hunter v. Prinsep*, said (b), "if the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded, unless the forwarding them be dispensed with, or unless there be some new bargain upon the subject." As well, therefore, on the facts of this case, as the principle established in *Hunter v. Prinsep*, we are of opinion, that the arbitrator has decided rightly.—With respect to the argument which has been pressed upon us, as to the bringing into a general average account the amount of freight that would have accrued on the sugars which were thrown over-board, and which must be considered as contributory to the loss; although it might be so, there appears to have been no decision in confirmation of such a position, nor does it appear to be the custom to do so in this country; and

(a) 10 East, 378.—(b) Id. 394.

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though it is so stated in the calculation referred to in *Abbott on Shipping*, yet that learned writer observes, that although he had included it in the estimate of losses, yet that it was omitted in an example proposed by *Pothier*, but charged in an adjustment of a general average given by *Magens*. Supposing, however, that it were so, it would only tend to lessen the contribution of the owners, but it is not to be considered as freight earned or due, or to grow due within the meaning of the statute 53 *Geo. 3*. On the whole, therefore, we are of opinion, that the award made by the arbitrator is perfectly correct, and consequently that this rule must be

Discharged.

Thursday,
Feb. 12th.

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A misdescription of the person to whom a licence from the Crown to trade with an enemy is granted, does not invalidate such licence:—as where he was described to be of *London*, merchant; whereas he was resident at the time at *Heligoland*, but on the point of coming to reside in this country.

THIS was an action of *assumpsit* on a policy of insurance, made the 30th *August*, 1810, at and from *Heligoland* to any port or ports in the *Baltic* and Gulph of *Finland*, against all risks, including the risk of craft, and until safely warehoused in the warehouse of the consignees, at the final ports or places of discharge, with liberty to carry and exchange real or simulated papers and clearances, and to seek, join, and exchange convoys, on ship or ships, with leave to proceed and sail to, and touch and stay at any ports or places whatsoever, and to touch, stay, discharge, and reload their cargoes at any port in *Sweden*, and to wait for orders, and for any purposes whatsoever, at or off any ports or places they might touch at, and to return to any port or ports without being deemed a deviation. At the foot of the policy was the following memorandum: “on goods as shall be declared and valued hereafter;” and indorsed on the policy was a declaration particularizing the goods, and valuing them at 10,150*l.*, and the insurance was declared

to be on such goods, *per the Vrouw Hendrieka*, Captain *Hendricks*. The plaintiff declared as for a total loss. The defendant pleaded *non assumpsit*.

The cause came on for trial before Lord Chief Justice *Dallas*, at *Guildhall*, at the Sittings after *Michaelmas* Term, 1821, when a verdict was found for the plaintiff, damages 500*l.*, subject to the opinion of the Court, on the following case: The plaintiff was a merchant at *Hanover*, and a native of that country, and at the time of effecting the policy, of granting the licence, and of the voyage, and of the loss, was residing within the *Hanoverian* dominions. The plaintiff, in the year 1810, was the owner of goods then lying at *Heligoland*, consisting of *British* colonial produce, which had been imported thither from this country, and were then in the possession of his agents there. The island of *Heligoland* was captured by his late Majesty's forces in 1809, and has since continued under the dominion of *Great Britain*. The plaintiff having resolved to send these goods to some of the neutral ports in the *Baltic*, employed as his agent for that purpose one *Charles Frederick Hampe*, and sent him to *Heligoland*, in that character. *Hampe* was a merchant, and was then on the point of coming to reside in this country, and had given instructions to his correspondents to procure him a residence here. The plaintiff, in the month of *August*, 1810, wrote to one *Frederick Klingender*, his agent in *London*, instructing him to effect an insurance to cover the adventure, and in consequence thereof, and prior to any vessel being chartered, *Klingender* effected the policy declared upon, which the defendant subscribed for 500*l.* Upon *Hampe's* arrival at *Heligoland* he wrote to *Klingender*, directing him to charter a vessel, and send her to *Heligoland*, for the purpose of loading her with the plaintiff's goods, and he also directed *Klingender* to procure and send him a licence. *Klingender*, accordingly, on the 27th *August*, 1810, chartered the *Vrouw Hendrieka*, a neutral vessel, and by the

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terms of the charter party she was to proceed to the island of *Heligoland*, or so near thereunto as she might safely get, and there load a complete cargo of lawful and permitted merchandize; and being so loaded therewith, to proceed to a port in the *Baltic*, but not higher up than *Koningsberg*, and deliver the same. *Klingender* also, in pursuance of his instructions, applied for, and obtained the following order in council and licence:

*At the Council Chamber, Whitehall,
 the 28th August, 1810.*

Present,

The Lords of his Majesty's most Honourable
 Privy Council.

(Duplicate).

" WHEREAS, there was this day read at the Board, the humble petition of *C. F. Hampe*, of *London*, merchant. It is ordered in council, that a licence be granted to the petitioner for permitting a vessel bearing any flag except the *French*, to proceed with a cargo of *British* manufacturers' colonial produce, and such goods as are permitted to be exported from *Heligoland* to any port in the *Baltic*, not under blockade, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other neutral or hostile port; and to whomsoever such property may appear to belong, upon condition that the name and tonnage of the vessel, name of her master, and time of her clearance from *Heligoland*, shall be indorsed upon the said licence; and that a certificate from the proper officer of the customs at *Heligoland* shall accompany the cargo, certifying that the same was originally exported from the United Kingdom, such licence to remain in force for four months from the date hereof; and at the expiration of the said period, or sooner, if the voyage be completed, to be deposited as the case may be, with the commissioners of his Majesty's cus-

toms at the port of *London*, or with the collector of the customs at the out-ports. And the Right Hon. *Richard Ryder*, one of his Majesty's principal secretaries of state, is hereby specially authorized to grant such licence, in case he shall see no objection thereto, annexing to such licence the duplicate of this order herewith sent for that purpose.

CHETWYND."

To all Commanders of his Majesty's ships of war, privateers, and all others whom it may concern—Greeting.

I, the undersigned, one of his Majesty's principal secretaries of state, in pursuance of the authority given to me by his Majesty, by order of council, under and by virtue of powers given to his Majesty by an act passed in the 48th year of his Majesty's reign, intituled, "An act to permit goods secured in warehouses in the port of *London*, to be removed to the out-ports for exportation to any port of Europe, for empowering his Majesty to direct that licences, which his Majesty is authorized to grant under his sign manual, may be granted by one of the principal secretaries of state, and for enabling his Majesty to permit the exportation of goods in vessels of less burthen than are now allowed by law during the present hostilities, and until one month after the signature of the preliminary articles of peace; and in pursuance of an order of council especially authorizing the grant of this licence, a duplicate of which order of council is hereunto annexed, do hereby grant this licence for the purposes set forth in the said order of council, to *C. F. Hampe*, of *London*, merchant, and do hereby permit a vessel, bearing any flag except the *French*, to proceed with a cargo of *British* manufactures, colonial produce, and such goods as are permitted by law to be exported from *Heligoland* to any port in the *Baltic* not under blockade, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any neutral or hostile port; and to

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whomsoever such property may appear to belong, provided that the name and tonnage of the vessel, name of her master, and time of her clearance from *Heligoland*, shall be indorsed on this licence; and that a certificate from the proper officer of the customs at *Heligoland*, shall accompany the cargo, certifying that the same was originally exported from the United Kingdom. This licence to remain in force for four months from the date hereof; and at the expiration of the said period, or sooner, if the voyage be completed, this licence shall be deposited as the case may be, with the commissioners of his Majesty's customs at the port of *London*, or with the collector for the customs at the out-ports.

Given at Whitehall, the 28th August, 1810, in the 50th year of his Majesty's reign. R. RYDER."

The indorsements required by the licence were duly made, and also a certificate from the proper officer of the customs at *Heligoland*, as required by the licence. The *C. F. Hampe* named in the order of council and licence was the same person as the *C. F. Hampe* employed by the plaintiff as above stated.

The vessel then proceeded to *Heligoland*, and upon her arrival there, the goods specified in the policy were shipped on board by *Hampe*, the goods being the property of the plaintiff, and of the value stated in the policy. On the 17th *September*, 1810, the vessel, with her cargo, sailed under convoy from *Heligoland*, *Hampe* being on board of her as supercargo, bound for *Swinemunde*, in the *Prussian* dominions. On the 31st *October*, 1810, she arrived with her said cargo in the roads of *Swinemunde*, and soon after her arrival the vessel and her cargo were seized by a *Prussian* military force, and were subsequently condemned by the public authorities at *Swinemunde*, and the cargo became wholly lost to the plaintiff. Before any

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of these circumstances had taken place, *Hanover* was taken possession of in an hostile manner by the *French* troops, and during the whole period of the above mentioned transactions, the powers of government were exercised in *Hanover* by *Jerome Buonaparte*, the brother and ally of *Napoleon Buonaparte*, who was then at the head of the *French* government, and at war with this country, the said *Jerome Buonaparte* having assumed the title of king of *Westphalia*, and *Hanover* having on the 10th July, 1810, been declared by *Napoleon Buonaparte* a department of such kingdom of *Westphalia*. But these acts were never recognized by the government of this country or of *Hanover*, nor was any cession of *Hanover* made, or any war declared between *Hanover* and this country. The plaintiff, upon the trial, called as a witness, a clerk from the Council-office, who produced several original petitions, orders in council, and licences thereupon granted, about the time of the granting of the licence in question; in some of which petitions, orders in council and licences, the residence of the petitioners was not stated; in others, even the names of the persons intended to be interested were wholly omitted, and the petitions were stated to have been presented "on behalf of different merchants," without specifying either their names or national character; and further, the plaintiff offered to prove, by the same clerk, that at the time when the licence in question in this action was granted, the residence of the petitioner was not considered a material circumstance at the privy council board, which he was ready to verify, upon his own personal knowledge of the course of business, and also by the production of the council books, in which the applications for licences, and the minutes of decisions thereon were entered. The defendant objected, that neither the orders, petitions or licences, nor the parol testimony as to the practice and understanding at the council board, were admissible. The plaintiff insisted that the proposed proof was

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admissible; and ultimately it was agreed, that it should be made one of the points for the consideration of the Court upon this case, whether the proposed evidence was competent or not. The general question for the opinion of the Court was, Whether the plaintiff was entitled to recover? If the Court should be of that opinion, the verdict was to stand; if not, the verdict was to be set aside, and a nonsuit entered. And either party was to be at liberty to turn the case into a special verdict.

The case came on for argument on a former day in this Term, when,

Mr. Serjeant Taddy, for the plaintiff premised, that the object of the parties was to bring before the Court the decision of the Court of *King's Bench*, in the case of *Klingender v. Bond* (a), where the question arose on the same policy on which the present action was brought, and where that Court held, that the description of *Hampe* in the licence, as of *London*, merchant, whereas in fact he did not reside there, but at *Heligoland*, which place he was just about to quit, and settle in *London*, was a wrong description of the person to whom the licence was granted, and so far invalidated it as to be a fatal objection to the plaintiff's right to recover. That case, however, was decided without argument, and upon a mere motion to set aside a nonsuit. The order in council, by which a licence from the Crown was rendered necessary, was passed on the 31st May, 1809. And in *Klingender v. Bond*, Lord Ellenborough stated, that *Hampe* said at the trial, that he resided at *Heligoland* from 1806 to 1809, and that he then went to *Germany*, and intended to come and settle in *London* in the month of *March* following. He might, under these circumstances, therefore, have been considered as an

(a) 14 East, 484.

alien enemy. Here, however, the plaintiff, as the owner of the goods, could not be affected by any such disability, for he was a native of *Hanover*, and as such might be considered as a subject of the king of this country, in right of his crown of *Hanover*, and the order in council, under which the licence in question was required, was made for confining the trade with *Heligoland* to *British* ships navigated according to law, unless his Majesty should otherwise permit. At all events, the plaintiff cannot be considered as an alien enemy, or even an alien, according to the authority of *Calvin's case* (a), where it was laid down, that the protection and government of the king is general over all his dominions and kingdoms, as well in time of peace as in war, and that all are at his command and under his obedience; and therefore, that although one is abjured the realm, he still owes allegiance to the king, and remains within his protection, as the king may pardon and restore him to his country again; and *Heligoland* was in his Majesty's possession at the time the licence was granted, and has continued under his dominion ever since. No licence was necessary to legalize the persons of the parties, but only to remove any disability which might affect the ship, and authorize her being used for the particular adventure on which the insurance was effected, as she was not a *British* vessel. There is a manifest distinction where a licence is granted to remove any personal disability of the party to whom it is given, or to protect a vessel for a particular voyage. No disability could arise in this case on account of national character, which was legalized for all purposes of trade, but merely a disability as to the vessel, arising from the terms of the order in council. The previous decisions on the subject of licences have proceeded chiefly on the disability of the personal or national character of the grantee; here however none existed, as he was merely misdescribed as to his residence, and such mis-

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(a) 7 Rep. 9 b.

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description cannot tend to vitiate the licence, as his addition was not material. It would have been equally good if he had been described generally, as he was sufficiently known as the party who was to be the lawful object of the licence; and even if a particular description were necessary, to remove any disability as to national character, the mere misdescription of residence would not have the effect of vitiating the licence, which had no object whatever beyond the protection of the ship. It must be observed, that since the decision in *Klingender v. Bond* the Courts have materially changed their opinions, with respect to the subject matter of licences of this description, and have given them the most liberal and extended construction, in order to meet the exigencies of the times in which they were granted, it being found that the trade of the country could not well be carried on without them. In *Flindt v. Scott*, and *Flindt v. Crockett (a)*, the Court of Exchequer Chamber reversed a judgment of the Court of King's Bench, holding, that licences to trade, however strictly they might have been formerly, were then to be construed more liberally and favourably to trade, in order to effectuate the benefits intended to result from them; and therefore, that they ought to be interpreted largely, and with none of that jealous apprehension of the subject taking more than the Crown intended to give, by which royal grants had been fettered and controlled at common law. The same principle was laid down in *Morgan v. Oswald (b)*, and Mr. Justice Gibbs there stated (c), that Sir William Scott had laid down this principle: that while the trade of the country remained in its original state, and the licensed trade was the exception to the general rule, licences were to be construed strictly; but that since the licensed trade had become the general trade, and the unlicensed trade the exception, licences were to be construed liberally. That learned judge, in the case of the *Goede Hoop*, discussed at

(a) 5 Taunt. 674. — (b) 3 Taunt. 554. — (c) Id. 562.

great length the rules of interpretation to be applied to licences generally, and he there said (a), "where it is evident that the parties have acted with perfect good faith, and with an anxious wish to conform to the terms of the licence, I presume that I am only carrying into effect the intention of the grantor, when I have recourse to the utmost liberality of construction, which it is in the power of this Court to supply." So, in the case of the *Frow Cornelia* (b), Sir William Scott said, "In the use and application of licences, the Court will not confine the parties to a literal construction. It is sufficient that they shew, under the difficulties of commerce, that they come as near as they can to the terms of the licence; and where that is done, the Court will not prevent them from having the entire benefit intended by his Majesty's government."—Has then the licence in this case removed every disability with respect to the nature of the adventure? If it has, there can be no question but that the plaintiff is entitled to recover. It had no object beyond the protection of the ship, and the only previous existing disability was, that she was a neutral instead of a *British* vessel, and there was no limitation whatever in respect to her, except as to her carrying the *French* flag; there was no condition or restriction as to the national character of the party to whom it was granted, or description of the property, as the licence protected such property, to whosoever it might appear to belong, which therefore necessarily excludes any question which might arise as to proprietary interest. The cases of *Robinson v. Touray* (c), *Bazett v. Meyer* (d), *Hagedorn v. Reid* (e), and *Usparicha v. Noble* (f), are decisive to shew that even alien enemies, neutrals, and foreign subjects, are protected by licences of this description; and in the latter case Lord *Ellenborough* said (g), "for the purpose

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(a) Edw. Adm. Cas. 531.—(b) *Id.* 350.—(c) 1 Mau. & Selw. §17.
—(d) 5 Taunt. 824.—(e) 1 Mau. & Selw. 567.—(f) 13 East, 532.
—(g) 13 East, 341.

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of this licensed act of trading, the person licensed is to be regarded as virtually an adopted subject of the Crown of *Great Britain*." These cases were reviewed in *Morgan v. Oswald*, where it was decided, that a licence to a *British* merchant by name, and in general terms, that a ship might go to an hostile port, and bring home a cargo of goods, authorized the importation of such goods, being the property of an alien enemy, and a subject of such hostile country. And in *Bazett v. Meyer*, where a neutral insured against all risks until safely warehoused in the warehouse of the consignee;—it was held, that the adventure being in furtherance of the objects of *British* commerce, was protected by the policy against confiscation by the act of his own government, under the *Berlin* and *Milan* decrees. It therefore appears, that the Courts have even overlooked disabilities in the parties to whom licences of this description have been granted, and extended their privileges as far as they possibly could, for the purpose of furthering the object of such licences. Here, however, supposing all previous decisions were laid aside, the misdescription (if any) in the licence, cannot have the effect of vitiating it, so as to warrant the Court to set it aside, as it is clear that even disability as to national character cannot now have such an effect. Supposing the grantee had resided in *Ireland* previously to the Union, and had been described as living in *London*; if he intended to come and reside there, it cannot be contended for a moment that it would vitiate the licence. Even in the case of a grant, a mere misdescription of the place of residence of the grantee is not of itself sufficient to set it aside. Here, however, the licence was granted to the person to whom it was intended to apply, and he was described therein as of a place in which he meant shortly to reside. The interest in the property is immaterial, as the goods were to be exported from *Heligoland*, and there can only be two valid grounds of objection to the licence, viz. the one that the property was

represented to be the property of a *British* merchant, or to be shipped from this country; the other, that the ship belonged to the port of *London*; but both these suppositions are negatived by the language of the licence itself. There is no stipulation therein as to the national character of the grantee, and even if there had been, the description given was that by which he would be most likely to be known, he being forthwith about to settle in *London*. With respect to the admissibility of evidence for the plaintiff which was rejected at the trial, it was not necessary to support his case; and as the present question must depend on general principles, it will not affect the decision of the Court.

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Mr. Serjeant *Vaughan*, *contra*, relied on the case of *Klingender v. Bond*, which he submitted had never been impeached, nor its authority impugned or infringed on by any subsequent decisions; and as that case was determined on the same policy as the present, and Lord *Ellenborough* there invited the plaintiff to tender a bill of exceptions if so advised, in case he thought proper to proceed to another trial, it must be considered as decisive of the question. The principle relied on in *Calvin's* case, as to whether the plaintiff might be considered as an alien, is altogether inapplicable, as the question here turns on the construction of a licence to trade; and the plaintiff, as far as commercial purposes can apply, must be considered as standing in an hostile character: for as the king of this country was deprived of *Hanover* for a time, during which it was completely under the power and dominion of *France*, which was then at war with us; and as the *British* Government did not exercise any authority there at the time the licence was granted, the plaintiff must be considered as an alien, although the acts of *Napoleon* or *Jerome Buonaparte* were never recognized by this country.—The main question, however, is, whether *Hampe*, the grantee, can be considered as falling within the description of a *London* mer-

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chant, in the licence in question. Although it has been said that he intended shortly to reside in *London*, he was still a foreigner; and it does not appear that he had ever been in this country at the time the licence was granted. The description of the party applying for a licence of this nature should be true in every particular, as it was necessary to make the Crown acquainted with the circumstances of the intended adventure in all its parts, and enable them to ascertain that it was not meant as a subterfuge for hostile purposes, so as to operate as a fraud upon Government at the time the licence was given. It was absolutely necessary that the true and particular residence of the grantee should have been incorporated, as the licence was obtained from the privy council, through his petition and representation alone. In *Warin v. Scott (a)*, it was held, that if an alien enemy, commorant here under the king's licence to reside, purchase goods for exportation, such exportation by him, after his licence to reside had expired, is not protected by a licence to trade, obtained after such licence of residence had ceased. And Mr. Justice *Gibbs* observed (*b*), "that if ever the grantee possessed the character of a *British* merchant, it ceased upon the expiration of his licence to reside in this country." So in this case, if the grantee had left this country for *Hetigoland*, the licence could not avail him, as it could only operate whilst he was resident here. In *Bush v. Bell (c)*, it was held, that a licence to trade to an enemy's country, granted to one set of *British* merchants, could not be used to cover a trading by other *British* merchants, unless the latter could connect themselves with the parties licensed. These cases, therefore, are authorities to shew that there must be a true description of the person of the grantee in licences of this nature. With respect to the decisions of Sir *William Scott*, in the Court of *Admiralty*, they have fluctuated according

(a) 4 Taunt. 505.—(b) *Id.* 508.—(c) 15 East, 3.

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to the times in which they were pronounced, and were made to accommodate themselves to each particular case; and the rules of that Court are not to be rigidly adhered to, whilst those in a Court of law are stable and inflexible. No case can be found, with the exception of *Klingender v. Bond*, where there has been a misdescription in the residence of the grantee, as they all go to his disabilities, on account of national character. It is only necessary further to observe, in the emphatic language of Lord *Ellenborough*, in *Klingender v. Bond*, that, "should such a misdescription as the present, be deemed not to invalidate the licence, there never will be a licence of this sort that will describe the person correctly, so much is sought to be concealed in these matters." And considering to what an extent voyages have been prosecuted, under simulated papers, it is most expedient to the public, that licences of this description should be true in every respect, and that the least misrepresentation of the parties or purposes for which they are granted, or voyages they are intended to cover, will tend to avoid them altogether.

Mr. Serjeant *Taddy* in reply, insisted, that as a licence was only required for the purpose of legalizing the vessel, and not the person of the grantee, no fraud could be imputed to the parties, nor could the Crown be deceived by the licence it had granted, nor could the property be confined to an alien enemy or alien, as the licence extended to whomsoever such property might appear to belong. And in the case of the *Cousine Marianne* (a) Sir *William Scott* said, "this Court has never yet restored the property of an enemy, except in those instances where the words, "to whomsoever the property may appear to belong," are introduced into the licence; but where those words occur,

(a) Edw. Adm. Cas. 347.

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they have been held to exclude all enquiry into the proprietary interest." The licence in question, therefore, was to be effectual to whomsoever the goods might actually belong; and the grantee was to be considered as a mere petitioner, and as having no interest whatever in the goods which were the property of the plaintiff alone. In *Robinson v. Touray*, the licence was not considered as being confined to the grantee personally, or any particular class of persons; and the object, as appears on the face of it, was merely to procure a cargo of *Russian* goods to be brought into this country, without any restriction as to person or ship, with the exception that the vessel should not bear the *French* flag. In *Warin v. Scott*, the person interested in the exportation was an alien enemy, residing in this country by permission of the Crown, and the licence was granted to him individually, and for certain purposes only, *viz.* to enable him to travel from one part of the kingdom to another, so that an accurate personal description was absolutely necessary; and when the purpose for which the licence had been obtained, *viz.* his residence here, had expired, he lost every protection which he might have derived under it. On these grounds, the character or description of the party petitioning for the licence in this case was not material, unless the Crown were deceived by making such a grant; and a licence to carry on trade, cannot be impeached by a mere misdescription of the party to whom it may be granted, unless it be restrained in terms to the particular individual who may be interested in the goods, which, in this case, being the plaintiff's, he is consequently entitled to recover.

Cur. ado. vult.

Lord Chief Justice GIFFORD, on this day, having stated the material facts of the case, delivered the judgment of the Court as follows:—The question with respect to the admissibility of the testimony of the clerk from the

council office having been abandoned in the course of the argument, as being unnecessary to support the plaintiff's case, the only question now is, whether the licence having been granted to *Hampe*, by the name and description of *C. F. Hampe of London*, merchant; and it having been found as a fact in the case, that at the time it was granted, although he did not actually reside in *London*, yet that he intended and was then on the point of coming to live there, was such a misdescription as to vitiate the licence, and have the effect of preventing the plaintiff from recovering under the policy on which the present action was brought? A similar question, on the same policy, came before the Court of *King's Bench*, in the year 1811, in the case of *Klingender v. Bond*, and it being discovered, on the production of the licence, that the person to whom it was granted was resident at the time at *Heligoland*, but was just about to leave it and settle in *London*; and on its being objected, that the licence was void, as containing an incorrect description of the person to whom it was granted; Lord *Ellenborough*, before whom that cause was tried, being of that opinion, nonsuited the plaintiff. A motion was afterwards made by the then *Attorney-General*, to set aside that nonsuit; on which occasion it appears that the question did not undergo any great degree of discussion, but his Lordship retained the same opinion he had formed at the trial, *viz.* that *Hampe* was not properly described in the licence as a merchant of *London*, although he intended shortly to come and settle there; and he stated that the nonsuit did not bar the plaintiff's action, and that upon another trial he might be prepared to tender a bill of exceptions if he should be so advised. Another action has been brought by the present plaintiff on the same policy in this Court, and the question for our decision stands on precisely the same point as that which came before the Court of *King's Bench* in the case of *Klingender v. Bond*. It cannot but be recollect-

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ed, that at the early period in which licences of this description were granted, the Courts were disposed to construe them strictly, as being in the nature of grants from the Crown. That opinion, however, did not ultimately prevail, as it was soon found, that the object of these licences was to facilitate the commerce of this country with others: and, therefore, that they ought to receive a more extended and liberal construction. Various decisions, and many of which have been cited in the course of the argument, tend most strongly to confirm and support that construction, which it has been urged ought now to be given to those licences by Courts of law. The first case, as containing the strongest decision on this subject, is that of *Morgan v. Oswald*, where a licence was granted to one *Henry Duffin*, without any addition to his name, and which permitted a vessel, bearing any flag except the *French*, to pass in ballast from any port north of the *Scheldt* to *Archangel*, or any other port in the *White Sea*, and there to load a cargo of such goods as were permitted by law to be imported, and to proceed with the same to a port of the *United Kingdom*; and that licence was considered to legalize the shipping and importation of such a cargo, although it was the property of an alien enemy; and consequently, that it authorized him to insure and enforce his contract of insurance in our Courts. The object of the licence there was, to legalize the particular adventure; so it was in the case of *Warin v. Scott*, where it was held, that a licence granted to certain persons therein named, or other *British* merchants, did not extend to an alien enemy whose licence to reside in this country had expired before the latter licence had been obtained. In *Hagedorn v. Reid*, where a licence was granted to *J. P. Hagedorn* (the plaintiff), of *London*, merchant, on behalf of himself and other *British* or neutral merchants, to import a cargo from certain limits, within which an enemy's port was situate, in any vessel bearing any flag except the *French*, it was held to protect the

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ship trading from that port; in which ship, *J. P. Hays*—*down* and an alien enemy were jointly interested. That case was decided on the same principle as *Morgan v. Oswald*, viz. that the object of the licence was to legalize a commerce beneficial to this country; or in other terms, to legalize the importation without regard to the individual interested in it. The decisions of Sir *William Scott* in the High Court of Admiralty, and reported by Dr. *Edwards*, are founded on the same principle. The first question then in this case is, was there any fraud committed or intended to be practised in the description of *Hampe* in his petition for the licence? No attempt appears to have been made at the trial, to shew, either by evidence or otherwise, that any deception was intended to be practised at the council office at the time the licence was applied for, or granted. The name of the grantee, it is true, was given in by the description of *C. F. Hampe of London*, merchant, although he had not actually arrived there, but he intended shortly afterwards to make it his place of residence. The express object of the licence was merely to legalize the adventure in the exportation of a cargo from *Heligoland* to any port in the *Baltic* not under blockade. It is quite clear, that a licence was necessary to legalize the exportation from *Heligoland* in the first instance, there being an order in council restricting exportation in any other than *British* ships. The provisions or conditions required by the licence are not applicable to the person, but to the ship and cargo, and the mode as to which they were to be employed, and were as follows, viz.: "that the name and tonnage of the vessel, the name of her master, and time of her clearance from *Heligoland*, should be indorsed on the licence, and that the certificate from the proper officer of the customs at *Heligoland* should accompany the cargo, certifying that the same was originally exported from the United Kingdom." All those conditions have been strictly

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complied with; and with respect to the description of the grantee, although he is stated to be of *London*, merchant, yet, as it was found that he intended to reside there shortly afterwards, and it was not shewn by any part of the evidence, that he meant to continue his residence at *Heligoland*, or that the description in question was intended to operate as a deceit on the council or secretary of state, so as to induce them to believe that he was a *British* merchant, or that he intended to represent himself as such, without his having an actual intention to come over and fix his residence in *London*; it appears to us to be a proper description, and intended by him to apply to his future residence here. As, therefore, no fraud has been suggested, and instruments of this description are now to receive a liberal construction, and as the object of the licence in question was to legalize the adventure rather than qualify the party applying for it; it appears to us, (with great deference to the Court of *King's Bench*, in the case of *Klingender v. Bond*; and on considering the subsequent decisions in that Court, in which the construction given to those licences has been more liberal,) that the mis-description of the grantee in this case does not vitiate the licence; and consequently, that the plaintiff is entitled to recover.

Judgment for the plaintiff.

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1 King. 483.

Thursday,
Feb. 12th.

THIS was an action of covenant upon an indenture of lease, bearing date the 30th August, 1804, and made between one *William Hopson*, of the one part and the defendant of the other, of certain premises particularly mentioned in the lease, for the term of twenty-one years, from *Michaelmas* day then last past, at the yearly rent of 1290*l.*, and the plaintiff in his declaration made title to the said premises, as assignee of the reversion thereof, under the will of the said *William Hopson*; to which the defendant pleaded, that the said *William Hopson* did not by his last will and testament give and devise the said reversion, of and in the said demised premises, to *Thomas Moulden* and *John Chambers*, and their heirs, to hold as therein mentioned, in manner and form, &c. upon which issue was joined.

At the trial, before Mr. Justice *Park*, at *Westminster*, at the Sittings after *Michaelmas* Term, 1821, a verdict was taken for the plaintiff, damages 1290*l.* by the consent of counsel on both sides, subject to the opinion of the Court on the following case:

By indentures of lease and release, bearing date the 24th and 25th March, 1789, all that the rectory or parsonage of *Minster*, in the Isle of *Sheppey*, in the county of *Kent*, and all that messuage or tenement called or known by the name of the *Parsonage House* at *Minster* aforesaid, together with the barns, stables, out-houses, edifices, buildings, closes, yards, gardens, and several pieces of arable, meadow, pasture, and marsh-lands following, (that is to say), all that piece or parcel of land commonly called or known by the name of *Platt's* lands, containing by estimation fourteen acres; the two pieces of meadow land before *Platt's* lands, containing by estimation five acres; the piece of land commonly

Where a testator devised the rectory or parsonage of *Minster*, with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises thereunto belonging:—
Held, that certain lands which had been acquired or purchased by the owners of the rectory, between the years 1607, and 1632, and had been uniformly occupied with it since, and were described in the several successive leases of the property, passed under such devise.

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called or known by the name of *Holland's*, containing fifteen acres; one other piece or parcel of land, commonly called or known by the name of *Upper Burston's*, containing nine acres; one other piece or parcel of land, commonly called or known by the name of *Lower Burston's*, containing eight acres; one other piece or parcel of meadow land, lying before the said messuage or tenement, containing about four acres; the *Springs*, lying behind the said messuage or tenement, containing ten acres, or thereabouts; one other piece or parcel of land commonly called or known by the name of *Barton Hill*, containing forty acres; one other piece or parcel of land, commonly called or known by the name of the further *Barton Hill*, containing thirty-five acres; the *New Grounds*, containing twenty-one acres; one other piece or parcel of land called *Shardens*, containing thirty acres; and also all that messuage, tenement, or cottage, with the yard, garden, and piece or parcel of meadow land thereto belonging, commonly called the *Shoulder of Mutton* piece, containing by estimation two acres, more or less, with the appurtenances; and also all that piece or parcel of fresh marsh land commonly called or known by the name of the *Ferry Marsh*, containing by estimation four acres, more or less; all which said several pieces or parcels of land contain together in the whole by estimation one hundred and ninety-eight acres, more or less, with the appurtenances, and are with the said messuage or tenement, cottage and premises aforesaid, situate, lying and being in the said parish of *Minster*, in the isle of *Sheppey* aforesaid, and were formerly in the tenure or occupation of *John Gore*, Esq., afterwards of *John Baker*, afterwards of *George Evans Baker*, afterwards of *John Hopson*, and now of the said *William Hopson*, his assigns or under-tenants;— and also, all and all manner of tithes, oblations, and obventions, yearly, and every year, growing, renewing, and arising within the said parish of *Minster*, together with

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all and all manner of houses, &c. to the said messuages or tenements, cottage, rectory, parsonage, land, hereditaments and premises belonging, or in any wise appertaining, accepted, reputed, deemed, taken, or known, as part, parcel, and member thereof, save and except, and always reserved thereout unto the releasors, the donation, right of presentation, and patronage to the curacy of the said parish and parish church of *Minster* aforesaid, and which was not meant or intended to be granted and conveyed, and the reversion, &c. were conveyed unto and to the use of the said *William Hopson*, his heirs and assigns for ever.

It appears, that, in the fifth year of the reign of *James I* (1607), the several lands hereinbefore specified, did not form part of the rectory or parsonage of *Minster*, as, on the 13th of *November* in that year, by indentures of bargain and sale enrolled in *Chancery*, *Sir James Cromer*, and *Dame Martha* his wife, sold and conveyed the rectory or parsonage in question, to *Sir Edward Hales*, Bart. and *John Hales*, Esq. his son and heir apparent, by the following description, "All that the rectory or parsonage of *Minster*, with the appurtenances in the isle of *Sheppey*, or elsewhere, in the said county of *Kent*; and all and singular houses, buildings, glebe lands, tenths, meadows, pastures, waters, fishings, tithes, oblations, obventions, commodities, profits, emoluments, and hereditaments whatsoever, to the same rectory or parsonage belonging or appertaining; and all and singular the liberties, franchises, rights, royalties, jurisdictions, pre-eminences, and hereditaments of the said *James Cromer*, to the same rectory or parsonage appertaining or belonging, or as part, parcel, or member, or in or by reason of the same, or any part thereof lawfully used, reputed, taken, occupied or enjoyed; and all that messuage or tenement, barn, and twelve acres by estimation of land in *Minster* aforesaid, with the appurtenances, late *Christopher Tilman's*, and before *Matthew Hadd's*, Esq. abutting upon lands there called *Barton*

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Hill towards the east, to lands there called *Jacob's* and *Houberry's* towards the south, to lands now or late *Herman's* towards the west, and to lands now or late *Batchlor's*, called *Holland's*, towards the north, now or late in the occupation of *Thomas Hatch* or his assigns; which said messuage, barn, and twelve acres before mentioned, are holden of our Sovereign Lord the King's Majesty, as of his manor of *Mylton*, alias *Middleton*, in fee seage, and not otherwise."

Between the date of this indenture of bargain and sale in the fifth year of the reign of *James I.* and 1632, the several pieces of arable, meadow, pasture, and marsh land called *Platt's* land, the two pieces of meadow land before *Platt's* land, the piece of land called *Holland's*, the piece of land called *Upper Burston's*, the piece of land called *Lower Burston's*, the piece of meadow land lying before the said messuage or tenement, the *Springs*, *Barton Hill*, the *Further Barton Hill*, the *Shardens*, the *Shoulder of Mutton* piece, and the *Ferry Marsh*, were purchased in fee simple, by the several and successive owners of the rectory or parsonage of *Minster*, and have been occupied together, both before and since the purchase made by the testator as hereinafter set forth. And by an indenture of lease bearing date the 28th August, 1747, *John Gore*, Esq. being then seized in his demesne as of fee, of and in all and singular the said messuages, lands, and premises comprised in the indentures of lease and release to the said *William Hopson*, of the 24th and 25th March, 1789, demised and let the same, except the piece of land called the *Ferry Marsh*, to *John Baker*, for a certain term mentioned in the said indenture of lease, and now expired, by the following description, viz. "all that messuage or tenement, with the barns, stables, out-houses, lodges, yards, closes, gardens and appurtenances, commonly called or known by the name of the *Parsonage*; and also all those several pieces or parcels of land thereunto belonging, commonly called or known by the se-

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veral names of *Platt's* land, the two meadows before *Platt's* land, *Holland's*, *Upper Burston's*, *Lower Burston's*, the meadow before the house, the *Springs* behind the house, *Barton Hill*, *Further Barton Hill*, the *New Grounds*, and *Shardens*, and containing together in the whole, by estimation, one hundred and eighty-eight acres, more or less; which said messuage or tenement, and several pieces of land, are situate, lying, and being in *Minster* aforesaid, and are now in the tenure or occupation of the said *John Gore*, his assigns or under-tenants; and also all that other messuage or tenement, with the out-houses and appurtenances, formerly called the *Shoulder of Mutton*, together with the meadow behind the same or thereunto belonging, containing by estimation two acres, more or less, situate in *Minster* aforesaid, and now or late in the tenure or occupation of *Robert Bowyer*, his assigns, or under-tenants; and also all the glebe land, and tithes of corn, grain, and hay, and all other tithes called great tithes; and also all the tithes of seeds, pasture, and feeding, and all other tithes called small tithes, and all compositions, &c. And by a certain other indenture of lease, bearing date the 7th September, 1766, *William Gore*, Esq. being then seised in his demesne as of fee, of and in all and singular the same messuages, lands and premises, demised and let the same to one *John Hopson*, for a certain term mentioned in the said indenture of lease, and now expired, by the following description, viz. "all that messuage or tenement, with the barns, stables, out-houses, lodges, yards, closes, gardens and appurtenances, commonly called or known by the name of the *Parsonage*; and also all those several pieces or parcels of land thereunto belonging, commonly called or known by the several names of *Platt's* land, the two meadows before *Platt's* land, *Holland's*, *Upper Burston's*, *Lower Burston's*, the meadow before the house, the *Springs* behind the house, *Barton Hill*, *Further Barton Hill*, the *New Grounds*, and *Shardens*, and containing toge-

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ther in the whole, by estimation, one hundred and eighty-eight acres, more or less; which said messuage or tenement and several pieces of land, are situate, lying, and being in *Minster* aforesaid, and were heretofore in the tenure or occupation of *John Gore*, Esq., afterwards of *John Baker*, late of the said *William Gore*, and now of the said *John Hopson*, his assigns or under-tenants; and also all that other messuage or tenement, with the out-houses and appurtenances, formerly called the *Shoulder of Mutton*, together with the meadow behind the same or thereunto belonging, containing by estimation two acres, more or less, situate, lying, and being in *Minster* aforesaid, and now or late in the tenure or occupation of *Robert Bowyer*, his assigns, or under-tenants; and also all that piece or parcel of marsh land called the *Ferry Marsh*, lying in *Minster* aforesaid, containing by estimation four acres, more or less, and now or late in the tenure or occupation of *Thomas Randall*, his assigns or under-tenants. And also all the glebe land, and tithes of corn, grain, and hay, and all other tithes called great tithes, and all the tithes of seeds, pasture, and feeding, and all other tithes called small tithes, of what nature or kind soever, and all compositions, &c. — Prior to the purchase by *William Hopson*, Esq. of the several premises comprised in the indentures of lease and release, of the 24th and 25th *December*, 1789, the said *William Hopson*, had by indentures of lease and release, dated the 14th and 15th *April*, 1783, also purchased in fee simple certain other premises called *Poor's Farm*, *Ripney Hills*, and *Horse Marsh*; and by the said indenture of lease of the 30th *August*, 1804, and made between the said *William Hopson* and the defendant, the said *William Hopson* being then seised in his demesne as of fee, of and in all and singular the premises comprised in the same lease, demised and let unto the said defendant, for a certain term of years yet unexpired, as well all and singular the premises comprised in the indentures of lease and release of the 24th and 25th *December*,

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1789, as also the premises called *Poor's Farm, Ripney Hills, and Horse Marsh*, purchased as before mentioned by the conveyances of the 14th and 15th April, 1783, by the following description, viz. all that messuage or tenement, with the barns, stables, out-houses, lodges, yards, closes, gardens and appurtenances, commonly called or known by the name of the *Parsonage*; and also all those several pieces or parcels of land thereunto belonging, commonly called or known by the several names of *Platt's land, the two meadows before Platt's land, Holland's, Upper Burston's, Lower Burston's, the meadow before the house, the Springs behind the house, Barton Hill, Further Barton Hill, the New Grounds, and Shardens*, and containing together in the whole, by estimation, one hundred and eighty-eight acres, more or less; which said messuage or tenement, and several pieces of land, are situate, lying, and being in *Minster* aforesaid, and were heretofore in the tenure or occupation of *John Gore, Esq.*, afterwards of *John Baker*, then of *William Gore*, and afterwards of *John Hopson*, his assigns or under-tenants, and now of the said *John Chambers* (the defendant), his assigns or under-tenants; and also all that other messuage or tenement, with the out-houses and appurtenances, formerly called the *Shoulder of Mutton*, together with the meadow behind the same or thereunto belonging, containing by estimation two acres, more or less, situate, lying, and being in *Minster* aforesaid, and heretofore in the tenure or occupation of *Robert Bowyer*, his assigns or under-tenants, and now of the said *John Chambers*, his assigns or under-tenants; and also all that piece or parcel of marsh land, called the *Ferry Marsh*, lying in *Minster* aforesaid, containing by estimation four acres, more or less, and heretofore in the tenure or occupation of *Thomas Randall*, his assigns, or under-tenants, and now or late of the said *John Chambers*, his assigns or under-tenants;—and also all the glebe land, and tithes of corn, grain, and hay, and all other tithes called great

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tithes, and also all the tithes of seeds, pasture, and feeding, and all other tithes called small tithes, of what nature or kind soever, and all compositions, oblations, offerings, and other titheable things which shall at any time during the term of years hereinafter granted, grow, arise, be, and increase within the parish of *Minster* aforesaid, or the titheable places thereof, with the appurtenances.—The before mentioned premises, contained in the said purchase deeds of the 24th and 25th *December*, 1789, were rated together to the land-tax in the following words, *viz.* “The *Parsonage* of *Minster*, consisting of the great and small tithes in the parish of *Minster*, together with a messuage and cottage, two barns, two stables, and arable and pasture lands:” and which land-tax Mr. *Hopson* redeemed in the year 1790, together with the land-tax of his other estates in the county of *Kent*, as appeared by a certificate, a copy of which was annexed to the case. On the 17th *February*, 1817, the said *William Hopson* being then seised in his demesne as of fee, of and in all and singular the said several messuages, lands, and premises comprised in the last mentioned indenture of lease, made and published his last will and testament in writing, duly executed and attested so as to pass real estates, and thereby, amongst other things, gave and devised as follows, that is to say—“I give and devise unto *Thomas Moulden*, of *Bermondsey*, wool-stapler, and *John Chambers* of *Minster*, gentleman, and their heirs, all that the rectory or parsonage of *Minster*, in the isle of *Sheppey*, in the county of *Kent*, with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises *thereunto belonging*, with their and every of their rights, members, and appurtenances; and also all that messuage or tenement, and farm, called or known by the name of *Poor’s Farm*, with the barns, stables, backsides, yard, garden, and several pieces or parcels of land thereunto belonging, containing together in the whole by estimation seventy-five acres, more or less, with the appurte-

nances, situate, lying, and being in *Minster* aforesaid, and now in the occupation of the said *John Chambers*, his assigns or under-tenants:—and also all those several pieces or parcels of arable, pasture, and meadow land, called or known by the name of *Ripney Hills*, and two pieces or parcels of meadow or marsh land thereunto belonging, containing together one hundred and fifteen acres, more or less, situate, lying, and being in the parish of *Minster* aforesaid, and now in the tenure or occupation of the said *John Chambers*, and the executors of one *Richard Ingleton*, deceased, their assigns or under-tenants:—and also all that piece or parcel of marsh land, called or known by the name of *Horse Marsh*, containing by estimation ten acres, more or less, situate, lying, and being in the parish of *Minster* aforesaid, and now in the occupation of the said *John Chambers*, his assigns or under-tenants: to hold the said rectory, and all and singular the said several hereditaments and premises, with their appurtenances, unto the said *Thomas Moulden* and *John Chambers*, their heirs and assigns, to the uses, and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same, that is to say, to the use, intent and purpose, that my wife *Elizabeth Hopson*, and her assigns, may have, receive, and take thereout during her natural life, one annuity or clear yearly rent charge of 500*l.* of lawful *British* money, the same to be paid and payable, free from all taxes and other deductions whatsoever, by four equal quarterly payments.”—The will contained the usual power of distress and entry, and subject to the said annuity or yearly sum of 500*l.*, and to the powers and remedies thereby given for the enforcing and securing the payment of the same, the testator willed and directed that the said rectory, parsonage, messuages, lands, farms, tenements, tithes, hereditaments, and premises aforesaid, so charged therewith, should, with the appurtenances, be and remain, and he thereby gave and devised the same to the

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use of *William Ongley*, (the plaintiff), by the description therein contained, for and during his natural life, without impeachment of waste, with certain remainders over. The testator was also possessed of or entitled to considerable other real estates, besides the lands comprised in the indenture of lease of the 30th August, 1804; all of which estates he devised specifically to different persons named in his will, and then followed this residuary clause.—“And as to all the rest, residue, and remainder of my goods, chattels, ready money, securities for money, real and personal estate and effects whatsoever and wheresoever; (but as to my personal estate, subject to the payment thereof, of all and every my just debts, funeral, and testamentary expenses, and the several legacies hereinbefore given and bequeathed), I give and bequeath the same and every part thereof unto *William Nettlefold*, *Edward Nettlefold*, the said *Thomas Moulden*, and *John Chambers*, their several and respective heirs, executors and administrators, respectively, according to the value and quality thereof, equally to be divided between them, share and share alike, and to take as tenants in common and not as joint tenants.” — It was admitted at the trial, that if *Platt's* land, the two pieces of meadow before *Platt's* land, the piece of land called *Holland's*, the piece of land called *Upper Burston's*, the piece of land called *Lower Burston's*, the piece or parcel of meadow land lying before the said messuage or tenement, the *Springs*, *Barton Hill*, the *Further Barton Hill*, the *Shardens*, the *Shoulder of Mutton* piece, and the *Ferry Marsh*, were included in the devise to the plaintiff, the testator had no other “real estate,” wherewith to satisfy those words in the devise of the general residue of his real and personal estate. Some memoranda, copies of which were annexed to the case, in the hand-writing of the testator, were offered in evidence on the part of the plaintiff, and objected to.

If the Court should be of opinion that they were admis-

sible, they were to become part of the case, otherwise not. The question for the opinion of the Court was, whether the plaintiff were entitled to recover for any, and what sum; and if so, a verdict was to be entered accordingly, if otherwise, a verdict was to be entered for the defendant.

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This case was argued three times, *first*, in *Michaelmas* Term, 1822, by Mr. Serjeant *Lens* for the plaintiff, and Mr. Serjeant *Taddy* for the defendant. *Secondly*, in the last *Easter* Term, by Mr. Serjeant *Vaughan* for the plaintiff, and Mr. Serjeant *Pell* for the defendant; and *lastly*, in this Term, in consequence of the retirement of Lord Chief Justice *Dallas* in the course of the last vacation, by Mr. Serjeant *Vaughan* for the plaintiff, and Mr. Serjeant *Taddy* for the defendant. — For the plaintiff, it was submitted, that the main question was, what part of the lands comprised in the demise to the defendant in 1804, passed to the plaintiff who claimed as assignee of the reversion under *Hopson's* will, by which he devised the rectory or parsonage of *Minster*, with the messuages, lands, &c. and all and singular other the premises *thereunto belonging*, with their and every of their rights, members and appurtenances? There can be no doubt but that all the lands specified and enumerated in the deeds of lease and release, of *December*, 1789, passed, as having been usually occupied with the rectory; and, consequently, the *Shoulder of Mutton* piece and *Ferry Marsh* also passed, as they were particularised and described in such deeds as belonging to the rectory. The words “thereunto belonging,” have no legal import or definition in themselves, but must be taken in their popular acceptance, and construed as “usually occupied with,” thereby giving to the word “belonging” a general instead of a strict technical sense. In *Viner's Abridgment* (a) it is stated, that, “in strictness of law, *lund* cannot be said to be appurtenant to *house* or

(a) Tit. Appendant, Vol. II. p. 600.

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land, but in vulgar reputation, it may be said *belonging*, and in such case, in case of grant, the land will not pass as appertaining to land: but in case of a will, it seems it may." In *Knight's* case (a), Lord Chief Justice *Ley* decided how this word should be construed, and the sense which it ought to convey, viz. that the word "belonging" has two meanings, and may be taken in two ways, the one in course of right, and the other in case of occupation:—to the first, there ought to be prescription time out of mind;—to the second, occupancy. Although "belonging" may have a stricter sense than to be ruled by time, yet, that which has been considered "to belong" for even a year or a shorter time is sufficient to satisfy the law; and any thing being so described in a will, may pass without an objection. In *Symonds v. Green* (b), it was held, that an effectual reputation as to freehold property belonging to laud might grow up in two years, if it had been united and existed for that term; and that if after that term it was described in a conveyance as belonging thereto, the reputation and not the legal sense of the thing would be looked at. In *Gennings v. Lake* (c), the Court conceived, that land might be said to be appertaining to a house, as well in the case of the King as a subject. It might be supposed, that a technical definition should be strictly attended to in the case of a subject, but much more so in the case of the King; and, yet it was held, that the term "appertaining" was a proper description of land to a house, where it had been held and occupied together for a convenient time. Here, the premises were demised in the year 1747, and have been occupied with the rectory ever since; the time of occupation, therefore, is more than sufficient to establish this part of the argument. With respect to the length of occupation, although, technically speaking, land cannot be appurtenant to a messuage ac-

(a) Godb. 353, pl. 447. *S. C. nomine Loftes v. Barker*, Palm. 375.

—(b) Cro. Car. 308.—(c) Cro. Car. 168.

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ording to the true sense of the word ["appertaining," yet a material distinction may be drawn between a messuage of an ordinary description and a rectory; for in *Hill v. Grange* (a), the Court took a distinction between corporeal and incorporeal hereditaments, and observed, that, the one was applicable to messuages and lands which had substance in them and might continue always, but that an incorporeal hereditament, such as advowsons and the like, which may be appendant or appurtenant to inheritances corporate, may be termed appurtenances. There, too, it was held, that the word *appertaining* to a messuage, might be taken in the sense of usually occupied with the messuage, or lying to it; and that when appertaining is placed with other words, so that it could not have its proper signification, it shall have such signification as was intended between the parties. That, too, was the case of a deed, which is infinitely stronger than a will, to which the Courts have always afforded a more liberal construction, in order to give effect to the intention of the testator. As, therefore, the word "appurtenants" or appertaining to, must be taken in its general acceptance or meaning, the words "thereunto belonging," must not be construed according to their strict definition, but as usually occupied with the premises which were intended to be devised. A manor may be considered in the same light as a rectory; and in *Thinne v. Thinne* (b), where, in a deed to make a tenant to the *præcipe*, the person seised, bargained and sold a manor, and all lands, parcel, or reputed parcel, and a recovery was suffered of the manor, the Court held, that the reputed parcel passed by the recovery, as well as the other lands. In *Hearn v. Allen* (c), there was a devise of a messuage *cum omnibus pertinentiis*, and it was decided, that two acres of meadow, four miles distant from the messuage did not pass; but that it would have been

(a) 1 Plowd. 170. S. C. Dyer, 130, pl. 69.——(b) 1 Lev. 27.
 ——(c) Cro. Car. 57.

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otherwise if the devise had been *cum terris pertinentibus*, and that distinction was recognized and adopted in *Archer v. Bennett* (a). Here, the property that was intended to be conveyed and pass with the rectory or parsonage, is expressly pointed out and explained by all the conveyances and leases which are set out in the case. The words "thereunto belonging," therefore, have no strict legal meaning, but must be taken in their popular sense, viz. as referring to the lands occupied with the rectory, and used with and lying contiguous to it. Although it may be said, that if the lands in question were included in the devise to the plaintiff, there would be none left to pass under the residuary clause of the will, as it was admitted at the trial, that the testator had no *real estate* to satisfy those words in the devise of the general residue of his real and personal estate; yet it must be considered, that that clause was introduced by way of caution, as the testator did not mean to die intestate of any part of his property; and in *Marshall v. Hopkins* (b), the Court allowed certain words to be transposed in the first part of a will, and confined those in the residuary devise to a particular parish, observing, that it was no objection to this construction, that a residuary clause giving all other the testator's real estate in that parish would have nothing to operate upon, and that it was frequent for a testator, after a specific devise of all his estates, to give all other his real estates in a sweeping or residuary clause, when he had nothing else left to dispose of.—Whether, however, these lands are to be considered as parcel of the rectory or not, is a matter of fact, which depends entirely on legal evidence. Parcel or no parcel is always a question of fact to be decided by a jury. The memoranda of the testator were therefore admissible to shew his intent, and how he had treated and dealt with the whole of his property. In *Doe d. Oxenden v. Chi-*

(a) 1 Lev. 131.—(b) 15 East, 309.

chester (a), it was held, that extrinsic evidence was admissible to explain the intent of the devisor, where an ambiguity was raised by extrinsic circumstances, because the will could not have effect without it. In that case, there was no latent ambiguity, as here, to call on the parties to give further explanation. There, too, it was a strict question of locality. Here, however, there is none, as the words "thereunto belonging," may include lands *belonging to the Parsonage* in one place as well as another. If, however, the memoranda may be resorted to, every doubt will be removed, as they point out all the lands of the testator belonging and appertaining to the rectory; and in *Goodtitle d. Radford v. Southern* (b), where a testator devised all his farm called *Troques* farm, the Court held it to be competent to shew by evidence of what parcels that farm consisted; and in *Doe d. Beach v. Earl of Jersey* (c), parol evidence was admitted to shew what lands were intended by the testator to pass under his will; and here, if the word "belonging," be taken in its popular sense, the length of occupation and intent of the devisor, clearly shew that the lands in question belonged to the rectory, and formed part of it, with the exception of the pieces called the *Poor's Farm*, *Ripney Hills*, and *Horse Marsh*, which immediately followed, and were specifically devised.

[Mr. Justice *Burrough*.—A difficulty presents itself to me as to the two distinct natures of the property, the one being termed a rectory or parsonage, and the other land.]

The twelve acres of land in *Minster* must at all events be considered as forming part of the rectory, and would consequently pass with it under the words "thereunto belonging," as they were described as having belonged to it in the reign of *James I.*, and have been invariably occupied with it ever since. Though lands may, in point of law, be considered to be different from a rec-

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(a) 3 Taunt. 147. S. C. 4 Dow, Parl. Cas. 93.—(b) 1 Mau. & Sel. 300.—(c) 1 Barn. & Ald. 550.

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tory, yet if they are held together, and a testator disposes of them as belonging thereto, there can be no doubt but that, in this case, he intended to convey all his lands united with the rectory; and, consequently, all those comprised in the indentures of *December, 1789*, passed to the plaintiff under the will.

For the defendant it was insisted. — *First*, that the words in the devise “of the rectory, with the messuages and other premises *thereunto belonging with their appurtenances*,” as connected with the leases and other documents as set out in the case, cannot receive a general construction, but must have a strict and proper meaning in point of law; nor can they be carried beyond their restrictive or technical sense. *Secondly*, if so, the Court will not allow them to be extended by extrinsic evidence, when they are capable of having a proper and legal construction and meaning given to them. *First*, the words “thereunto belonging,” have a strict and technical meaning. Lands cannot be said to belong to lands or a messuage, nor, strictly speaking, can they be said to be appurtenant or belonging to a rectory, for one piece of land cannot be appurtenant to another. But it has been said, that corporeal may be distinguished from incorporeal hereditaments, and that an advowson, being in the nature of an incorporeal thing, may be appurtenant to a messuage. But in this case, there were lands originally belonging to the rectory, sufficient to meet the language of the testator. They are not stated in the devise as reputedly belonging, occupied, or used with the rectory; and it is impossible for the Court to ascertain what lands were usually occupied with it, as they are differently set out in the deeds of 1747, and 1765; in the one, the *Ferry Marsh* having been expressly excepted, and in the other included. In the cases cited for the plaintiff, to shew that the word “belonging,” must be taken in its popular sense, the lands were reputed to belong to the messuage; but here the de-

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vise is merely of lands belonging to the rectory. Those lands must, in point of strictness and legal acceptance, be confined to the glebe, or lands to which tithes were originally annexed, and which would of themselves be necessarily attached to and form part of the rectory, according to the terms of the devise. If such be the strict and proper meaning of these words, can the Court extend them to an inappropriate and popular acceptance? As to *Hill v. Grange*, it was a case of a grant of lands appertaining to a messuage; and all the Court agreed, that land could not be appurtenant to land, nor could it be appurtenant to a messuage in the true and proper meaning of an appurtenance, for that a man cannot aver that to be appurtenant, which the law will not suffer to be appurtenant. It is quite clear, that if words can admit of a strict and legal interpretation, they cannot be taken in an unlimited or popular sense. In *Day v. Trig (a)*, there was a devise of freehold houses in a certain street; and, in point of fact, the testator had only leasehold houses there; and it was decreed, that although in a grant of all one's freehold houses, leasehold houses would not pass, yet the intent of the testator being to pass some houses, the word freehold should rather be rejected, than the will be wholly void.

[Mr. Justice Burrough referred to the case of *Pistol d. Randal v. Riccardson (b)*, as being the latest decision on this point.]

In *Clements v. Lambert (c)*, it was held, that where a right of common theretofore appurtenant to a messuage and land, was extinguished by unity of possession, a subsequent grant of the land, with all commons, advantages, hereditaments, and appurtenances whatsoever, *thereto belonging*, or in any wise appertaining, could not revive the former right or create a new right of common, although exercised since the unity of possession the same as before. So here, the words "thereunto belonging," cannot affect their being

(a) 1 Peere Wms. 286. — (b) 1 H. Bl. 26, n. — (c) 1 Taunt. 906.

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construed according to their strict legal sense, and not in their general or popular meaning; but the case of *Buck d. Whalley v. Nurton (a)*, appears to be precisely in point, and in which it was decided, that lands usually occupied with a house, will not pass under a devise of a messuage with the appurtenances, unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense; and that it will not *ex vi termini* comprehend land, although usually occupied with a house, but only such land or ground as is immediately connected therewith, and necessary to the commodious enjoyment of it; and there the Court did not see sufficient evidence of intention to justify them, in giving to the word "appurtenances," an effect beyond its strict sense, notwithstanding the fact of the enjoyment of the lands in question, together with the house. In *Doe d. Osenden v. Chichester*, the question arose on the admissibility of evidence, and is in point to shew, that the leases in this case cannot be used to explain the intention of the testator, or the construction of his will; and more particularly so, as there is no latent ambiguity, for the words of the devise admit of their proper and strict meaning being carried into effect; and the cases of *Doe d. Browne v. Greening (b)*, and *Doe d. Tyrrell v. Lyford (c)*, are authorities to prove, that evidence *dehors* a will, is not admissible, to shew that other property might be included, and that another estate was formerly united, and had been since enjoyed with the particular estate described in the will. As to whether the memoranda in question were admissible, the case of *Doe d. Brown v. Brown (d)* is precisely in point, to shew that they were not. For that case established the principle, that if a testator has left property which corresponds with the description in his will, extrinsic evidence is not admissible to shew that he intended to include other property not within

(a) 1 Bos. & Pul. 53.——(b) 3 Mau. & Selw. 171.——(c) 4 Mau. & Selw. 550.——(d) 11 East, 441.

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that description. The case of *Hearn v. Allan* is inapplicable to the present, as there the distinction turned on the expression "*cum pertinentiis, or cum terris pertinentibus.*" As to *Gennings v. Lake*, it may be admitted, that land may belong to a house to a certain extent, and when it is devised in a certain way, but that is only when the words in the will cannot be applied in a proper and legal sense. On the whole, therefore, the words "thereunto belonging," as contained in this devise, are capable of a strict technical and legal construction, and being so, cannot be extended to an indefinite or improper meaning. By the residuary clause, the testator gave the remainder of his real and personal estate to the defendant and three others, to be equally divided between them; and it was admitted at the trial, that if *Platt's Land*, and the several other pieces of land demised to the defendant, were included in the devise to the plaintiff, the testator had no other real estate to satisfy those words in the residuary clause. It must be admitted, that words of a like description are frequently inserted, when nothing is meant to be conveyed by them; but if it should appear otherwise, the Court is bound to give full effect to the whole of the will. There is, therefore, sufficient in this case to shew that the testator did not mean to devise the whole of the lands that are contended to have passed with the rectory to the plaintiff, but only the rectory itself, as it originally stood; or, at all events, the only lands that can be taken to belong to it are the twelve acres set out in the indentures of bargain and sale, in the reign of *James I.*

Cur. adv. vult.

Lord Chief Justice GIFFORD, having on this day stated the facts, as set out in the case, delivered the judgment of the Court, as follows:—The question which has been raised for our opinion, is, what passed under the first part of the devise in *William Hopson's* will, by which he gives and devises to *Thomas Moulden* and *John Chambers*, and their heirs, all that the rectory or parsonage

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of *Minster*, in the isle of *Sheppey*, in the county of *Kent*, with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises *thereunto belonging*, with all and every of their rights, members, and appurtenances. For the plaintiff it has been contended, that under this description, all those lands comprised in the indentures of lease and release of 1789, which preceded the mention of the *Poors Farm*, *Ripney Hills*, and *Horse Marsh*, passed under the description contained in the devise. For the defendant it has been contended, that none of these lands passed as lands belonging to the rectory. It has been agreed by the counsel on both sides, that the words *thereunto belonging* are not to be construed in the strict sense of appurtenant, as used in conveyances, but that such words might receive a much larger construction in the case of a devise; and undoubtedly, a variety of cases, decided on wills, shew most clearly that, such a construction might be applied to words more technical than those of *thereunto belonging*. It has also been agreed, that although land might not be appurtenant to land, yet that strictly speaking it might belong to a messuage or rectory, and that even under the word "appertaining" land might pass in a will, as belonging to a messuage, although in strictness of law not appurtenant thereto. The case of *Hill v. Grange* (a) was cited in the course of the argument; and as it was decided on the construction of a deed, it was far stronger than the present. There, the defendant, in bar to an action of trespass *quare clamsum fregit*, justified by stating, that a lease was made to him of a messuage, and of all the lands appertaining to the same messuage, to hold to the defendant for twenty years, at the yearly rent of forty shillings; and the Judges unanimously agreed, that the averment, that the land had been always appurtenant to the messuage, was bad in point of law; and that land might not be appurtenant to a messuage in the true and proper definition of an appurte-

(a) 1 Plow. 170.

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nance. But all of them, except Mr. Justice *Brown*, (who did not speak to this point) agreed, that the word *appertaining* to the messuage should be there taken in the sense of *usually occupied with* the messuage, or *lying to* the messuage. For that when *appertaining* is placed with the said other words, it cannot have its proper signification; and therefore, it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means, for it is commonly used in the sense of *occupied with*, or *lying to*, *ut supra*: and being placed with the said other words, it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law; and forasmuch as it is commonly used in that sense, it is the office of Judges to take and expound the words, which common people use to express their meaning, according to their meaning; and therefore, it shall be here taken, not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it."—Now that was the construction of a common law conveyance, as applied to a lease, and yet it was determined that the word "*appertaining*" might be taken in its ordinary acceptation, as occupied with the messuage. In the case of *Hill v. Grange*, as reported in *Dyer* (a), Mr. Justice *Stamford* thought that land might be appurtenant to a messuage, but not parcel thereof. But though the three other Judges disagreed with him, yet they all thought, that the land passed under the words "*cum omnibus terris eidem messuagio pertinent.*" as well by the intendment of the parties, as by the open knowledge of the use and occupation of the land and messuage together. The same proposition is laid down in *Palmer* (b), where it is said, that a joint occupation for five or six years was sufficient to make the lands appertain by construction, (that is to say) to be appurtenant to the messuage. In *Higham*

(a) 130, pl. 70.—(b) 375.

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v. Baker, Mr. Justice *Anderson* is reported to have said (a); "that lands shall pass, as pertaining to a house which hath been occupied with it by the space of ten or twelve years; for by that time it hath gained the name of parson or belonging, and shall pass with the house by that name, in a will or leases," &c. If this construction has been adopted by the Courts, as applied to common law conveyances, there can be no doubt, but that, in order to further the intentions of a testator, a more liberal construction may be adopted with reference to wills. Now, what was the situation of the lands in question? They were purchased previously to the year 1632, by the owners of the rectory, and have been occupied with it ever since. It was admitted by the defendant's counsel, in the course of the argument, that although the twelve acres were demised with the rectory in the 5th year of *James I*, they could not, strictly speaking, be appurtenant to the rectory; yet that it could not be denied, if they were properly designated, that they would pass by the words *thereunto belonging*, and it is quite clear that they could not be appurtenant in the reign of *James I*, and therefore, could only pass by the words "thereunto belonging," by unity of possession and concurrent occupation, so as to be joined to the rectory, and be taken as belonging thereto. There was an unity of title, and there had been an unity of possession or occupation, and they had become lands joined to the rectory, and that goes a long way to enable the Court to determine what ought to be the construction of the will with respect to the other lands. They were all purchased before the year 1632; and it will be found, that in the lease of 1747, the greater part of these lands are described as belonging to the parsonage or rectory, and to consist of 168 acres; and they are so described in the subsequent lease of 1765. And although it is true, that in the lease of 1747, the messuage with the appurtenances, called the *Shoulder of Mutton*, is not described as the other lands

(a) Cro. Eliz. 16.

are, *viz.* as belonging to the parsonage, but by a distinct description, yet it is immediately followed by general words, clearly applying to the rectory, *viz.* "all the glebe lands, and tithes of corn, grain, and hay, and all other tithes and compositions," &c. Now, the lease in question of 1804, contains the same description of the lands, as was used in the lease of 1765; but with this remarkable distinction, that the lands acquired by *Hopson* subsequently to 1768, are designated by a distinct and specific description; and in the will, the deviser knowing that the lands he had subsequently purchased would not be reputed as belonging to the rectory, he again enumerated them, and devised them under an accurate and specific description, clearly conforming to the terms contained in the lease. The case of *Buck d. Whalley v. Norton (a)*, which has been relied on in the argument for the defendant, so far from supporting his case, does not appear to touch the present question; but when carefully considered, it furnishes a strong inference or illustration of the principle, in favour of the conclusion to which the Court in this case will ultimately arrive: and it was there held, that lands usually occupied with a house, will not pass under a devise of "a messuage with the appurtenances," unless it clearly appears, that the testator meant to extend the word "appurtenances" beyond its technical sense. And the Court there thought, that, looking at the context of the will, and seeing that in the previous devise, the testator had been careful in devising his mansion-house wherein he then lived, and the lands and grounds thereunto belonging, and there held and enjoyed, *with the appurtenances*; that it was evident that he knew what he meant should be included under the word appurtenances under that devise: but, when he went on to state that it was his express will and desire, that the defendant should hold and enjoy his said capital mansion-house, with the appurtenances, for the

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(a) 1 Bos. & Pul. 53.

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space of one year next after his death ; it was thought, that the word "*appurtenances*" there, should be construed in its strict legal sense. This, however, is not a case in which the word "*appurtenances*" in one part of a will, is to be contrasted with appurtenances in another part of it, and in which the word "*appurtenances*" only is introduced ; but the expression here employed is, "the rectory or parsonage, with the messuages, lands, and all and singular other the premises *thereunto belonging*, with their and every of their rights, members, and appurtenances ;" thereby clearly showing, that the word "*belonging*" was not intended to be used or taken in the strict legal sense, as the word "*appurtenances*." It must be observed, too, that in this devise, the testator used the words rectory and messuages, whereas, strictly speaking, there was but one messuage belonging to the rectory, viz. the parsonage house ; and if there were any other, which was not strictly a part of the rectory, it is the *Shoulder of Mutton* piece. Considering therefore, that the lands in question have been always occupied together with the rectory ; as well as the terms used in the different leases in this case, and particularly that upon which this action is founded, viz. that of 1804 ; the Court are of opinion, that, under the general words "*thereunto belonging*," all those lands passed, which are described and enumerated in the deeds of lease and release of 1769 ; and consequently, that the plaintiff is entitled as assignee of the reversion, and that the verdict taken for him must stand.

Judgment for the plaintiff.

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STUBBING and Another, Executors of HOOPER, v. HAMMOND.

Thursday,
Feb. 12.

MR. Serjeant *Taddy* on a former day in this Term obtained a rule *nisi*, that the plaintiffs might have leave to discontinue this action without payment of costs. He founded his motion on an affidavit, which stated, that the plaintiffs had found a bond among the papers of their testator, which had been given to him by the defendant, and conditioned to secure to the testator the sum of 500*l*. with interest; that after an application to and refusal by the defendant to pay the bond, the present action was commenced; that the defendant pleaded *non est factum*, and a set off, on which issue was joined, and notice of trial given for the last *Michaelmas* Term, but which had been since countermanded, as the plaintiffs had taken the opinion of counsel, who thought that the set off would furnish a good defence, and he accordingly advised the action to be discontinued.

Where the plaintiffs as executors, brought an action on a bond given by the defendant to their testator, to which he pleaded a set off, which the plaintiffs were advised by counsel, after notice of trial had been given, would constitute a good defence to the action:—The Court allowed them to discontinue without payment of costs.

Mr. Serjeant *Peake* now shewed cause, and submitted, that the plaintiffs could not be allowed to discontinue without payment of costs; and that at all events it was in the discretion of the Court, whether they were liable to the payment of such costs or not. In *Harris v. Jones* (a), the Court laid down a rule, that an executor should not have leave to discontinue without costs, where he had knowingly brought his action wrong; and in *Melhuish v. Maunder* (b), this Court refused to allow executors to discontinue on payment of costs, unless good grounds were shewn. And here, as the plaintiffs commenced their action without previously making the necessary enquiry as to the nature of their testator's claim on the defendant, or

(a) 3 Burr. 1451. S. C. 1 Sir W. Black, 451.—(b) 2 New Rep. 72.

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whether it had been satisfied or not; they had put the latter to an unnecessary expence, and were consequently not entitled to the favour or indulgence of the Court.

Lord Chief Justice GIFFORD.—This is certainly an application to our discretion, and there appears to have been nothing vexatious in the plaintiff's having commenced an action against the defendant, on a bond which they had found among their testator's papers; and it does not appear that the defendant gave any satisfactory account to the plaintiff, as to whether it had been satisfied or not, when the application was made to him for payment; and as he pleaded *non est factum*, and a set off, which latter plea the plaintiffs afterwards discovered to be well founded, and as constituting a good defence to the action, I am of opinion, that, under the circumstances, they are entitled to discontinue without costs.

Mr. Justice PARK.—The general rule laid down in the cases of *Harris v. Jones* and *Melhuish v. Maunder* is, that an executor cannot discontinue without costs, where he has knowingly brought his action wrong, or acted vexatiously; but here, the plaintiffs had a right to bring an action on the bond in the first instance, and they could not know the nature of the defence, until the defendant had put in his pleas.

Mr. Justice BURROUGH concurring—

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tery:—the Court granted a new trial; and it seems that such an agreement is legal; and that the fact of adultery cannot be given in evidence under the general issue, but must be specially pleaded. *Quære* also, whether such declarations were admissible in evidence, and whether the plaintiff ought not to have had notice of the adultery previously to the commencement of the action? *Scholey v. Goodman*, M. 4 G. 4. Page 350

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1. An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in a certain sum, upon and by virtue of a certain charter-party of affreightment, bearing date, &c. for and on account of the hire of a certain ship called the *S.*, let to hire by the plaintiff to the defendant, and by him taken for a certain voyage from the port of *L.* to *P.*, is sufficiently certain, without formally shewing a breach of any particular stipulation or condition contained in the charter-party. *Skeen v. M'Gregor, E. 4 G. 4.* 107

2. An affidavit to hold to bail, stating, that "the defendant was indebted to the plaintiff in a certain sum, for money lent and advanced, and paid, laid out and expended by the plaintiff for the defendant, and for money had and received by the defendant to the use of the plaintiff," is sufficient without alleging that such sums were lent, or paid, or received by the defendant at his request; as such a request must generally be inferred. *Berry v. Fernandes, M. 4 G. 4.* 332

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1. Where the plaintiff had a joint cause of action against five defendants, all of whom were named in the affidavit to hold to bail, and a bailable *capias* was issued against one, under which he was arrested, and a bail piece taken, in which he alone was named;—and serviceable process was afterwards sued out against the other four, who were not named in the bailable process; and a declaration was delivered as against all; and the plaintiff proceeded against the bail on their recognizance, in which the name of the defendant who was arrested was alone insert-

ed, and to which they pleaded several pleas; the Court allowed the recognizance to be amended by adding the names of the other four defendants; on the terms of payment of costs by the plaintiff, and allowing the bail to plead *de novo*. *Christie v. Walker, E. 4 G. 4.* Page 33

2. A count in a writ of right cannot be amended by substituting an allegation, that "the defendant was seised of premises held by him at the will of the lord, according to the custom of a manor," instead of an averment, that "he was seised in his demesne as of fee and right:" and where a Judge, at chambers, made an order for such an amendment, the Court directed it to be discharged. *Tooth v. Bodington, E. 4 G. 4.* 42

3. The Court allowed several avowries in replevin to be amended by altering the name and description of the *locus in quo*, and stating the holding to have been for a year instead of half a year, and also by adding new avowries varying the amount of the rent, although issue had been joined, and notice of trial given and countermanded, and more than two terms had elapsed previously to the application for the amendment. *Prior v. Buckingham, (Duke), H. 4 & 5 G. 4.* 584

ANNUITY.

See BANKRUPT, 7.

1. Where *A.* and *B.* by deed, after reciting that *C.* had de-

vised certain lands to them in strict settlement, with remainder over to *D.* on failure of issue male of *A.* and *B.*; and that as *C.* had not made any other provision for *D.*;—in consideration of the esteem and regard *A.* and *B.* bore towards him, they agreed with *D.*, his executors or administrators, to pay him an annuity for 21 years, if *A.* and *B.* or the survivor of them should so long live; or in case *D.* should die within the term, then to his child or children, if any; but if there should be no child, to his then wife so long as she should continue a widow: and *D.* agreed that in case he or his heirs should come into possession of the property left by *C.*, by virtue of the limitations in the will or otherwise, he would repay to *A.* and *B.* all sums received by him, his children, or wife, on account of the annuity; and *D.* died within the term, intestate, leaving one daughter, who also died intestate within the term, and his wife died in his life-time:—*Held*, that *D.*'s administrator could not maintain an action against *B.* for non-payment of the annuity, after such respective deaths;—on the ground that it was not the intention of the grantors, that the annuity was to continue beyond the lives of the grantee and his family as described in the deed; and that the grant to them was merely personal, and could not be carried further. *Barford v. Stuckey, E. 4 G. 4.* 8

2. Where, on the grant of an annuity, a considerable portion of the consideration money was retained by, or returned to the agent of the grantee, for the expenses of preparing the deeds and for journeys, &c.:—

Held, that this was an illegal retainer, although the grantee swore that no part of the consideration money was retained or kept back by his direction, authority, or privity, (he should have gone further, and stated that none was *returned*); and the Court set aside the annuity, notwithstanding ten years had elapsed since it was granted, and the grantor had acquiesced in its payment during that period;—on the terms of an account being taken before the Prothonotary, who was to ascertain what sum might be due to the grantee in respect of principal and interest. *Williamson v. Goold*, E. 4 G. 4.

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3. Where a surety taken in execution, under a judgment entered up on a warrant of attorney, given by him to secure the payment of an annuity, obtained an order to be discharged out of custody on payment into Court of the balance which might be found due to the grantee, on taking an account before the Prothonotary; and the principal afterwards succeeded in setting aside the annuity deed and other securities on which it was founded, upon the ground of an illegal retainer of part of the consideration money, on

payment of the balance which might be found to be due to the grantee, on an account to be taken by the Prothonotary; and the surety afterwards applied to be discharged out of custody, on the ground that the deeds were set aside as against his principal: the Court refused to interfere, unless he had previously paid the balance into Court, according to the terms of the first order, or would give security to the Prothonotary to cover the amount which might ultimately be found to be due from his principal to the grantee of the annuity. *Williamson v. Goold*, Bart. T. 4 G. 4. Page 224

4. Where persons were employed by the grantor to raise money by way of annuity, and by the grantees to pay the consideration money over to the grantor, and, at the time of the execution of the deeds to secure the annuity, such persons received back from the grantor, or retained a considerable portion of the consideration money for a debt alleged to be previously due to them from the grantor:—*Held*, that this was an illegal retainer, and the Court, on motion, ordered the securities to be set aside, on the terms of the grantor's paying what might be found to be due to the grantees in respect of principal and interest, although the latter had not received any part of the money so returned or retained, and although it was done without their direction, privity,

knowledge, or assent. *Conventry v. Champneys, Bart., Gorton v. Same, T. 4 G. 4.*

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5. Where an annuity was ordered to be set aside on the terms of an account being taken before the Prothonotary, who was to ascertain what sum might be due from the grantor to the grantee in respect of principal and interest:—*Held*, that the latter was entitled to be allowed the fair and reasonable disbursements for the conveyances by which the annuity was secured, but that he could not claim sums paid by him for insuring the life of the grantor, unless there had been a special provision in the deed to that effect. *Williamson v. Goold, T. 4 G. 4.* 324

APOTHECARY.

1. By the apothecaries' act (55 Geo. 3, c. 194, s. 14), it is provided, that no person shall be admitted to an examination for a certificate to practise, unless he shall have served an apprenticeship, and shall produce testimonials of a sufficient medical education to the satisfaction of the court of examiners:—*Held*, that a certificate duly issued by that Court, is conclusive evidence of those facts; and that in an action to recover the amount of an apothecary's bill, it is not incumbent on the plaintiff to prove that he has served an apprenticeship. *Sherwin v. Smith, E. 4 G. 4.* 30

ARREST.

APPRENTICE.

See APOTHECARY.

1. In an action of covenant for the breach of an indenture of apprenticeship, and brought by the father and apprentice against the master, they cannot be called on at the trial to make oath as to the amount of the premium actually paid with the apprentice at the time he was bound, as required by the statute 8 Anne, c. 9, s. 43, as it must be presumed, that such oath was taken before the commissioners of stamps, at the time the stamp was impressed on the indenture. *Stewart v. Lawton, M. 4 G. 4.* Page 414

APPROPRIATION.

See ASSUMPSIT, 1.
BOND, 2.

ARBITRATION.

See AWARD.

ARBITRATOR.

See ATTORNEY, 6.
AWARD.

ARREST.

See BARON & FEME, 2.

1. Where a defendant, whose name was *John Thomas* had been arrested by the name of *James Thomas*, and signed a bail-bond with the initials *J. T.*:—*Held*, that such signature was no waiver of the irregularity in the writ; and the Court ordered the bail-bond to be set aside. *Coles v. Gunn, H. 4 & 5 G. 4.* 526

2. Where a sheriff's officer having received a writ to arrest the defendant, permitted him to go at large, on his promising to put in good bail, and afterwards finding that the bail intended to be put in were insolvent, he put in bail for his own indemnity, and without the consent of the defendant, and took him in custody in their discharge, the day previous to that on which the defendant's time for putting in bail would expire: the Court ordered the defendant to be discharged, and the officer to pay the costs of the application; and it appearing that two other persons were implicated in the transaction, they were required to join in the payment of such costs. *Taylor v. Evans, M. 4 G. 4.* Page 398

ARREST OF JUDGMENT.

See ATTORNEY, 6.

LIBEL.

ASSAULT.

See FALSE IMPRISONMENT, 1.

ASSIGNEE.

See ASSUMPSIT, 2.

BANKRUPT.

EVIDENCE, 2.

INSOLVENT DEBTOR, 1.

ASSUMPSIT.

See ABATEMENT.

ADULTERY.

BANKRUPT, 4.

COSTS, 1.

INTEREST OF MONEY.

1. Where an infant who was entitled to certain personal pro-

perty on her coming of age, as a residuary legatee, joined her father in a bond to secure to the plaintiff a sum due to him for the rent of apartments occupied by her and her father; and after she became of age, employed the defendant to take out administration *de bonis non* of the assets of the testator, (his executor being dead), which the defendant accordingly did, and became possessed of the property; and she afterwards gave the plaintiff an order on the defendant to pay the amount of her father's bills due to the former, which on being presented to the defendant, he acknowledged that he possessed adequate funds, and that a person would be safe in advancing money on the security of the bond: but, before the order was executed, or the sum paid under it by the defendant, the daughter countermanded it:—*Held*, that as he had consented to appropriate a sum sufficient to pay the plaintiff's demand, he was liable to an action for money had and received, in which the plaintiff might not only recover the amount of the bond, but an acceptance given by the father of the infant, before she became of age, and which she afterwards requested the defendant to pay. *Robertson v. Fauntleroy, E. 4 G. 4.*

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2. Where, in an action of assumpsit, the declaration stated, that the defendant was indebted to

the plaintiff as assignee of *J. S.* a bankrupt, for goods sold and delivered to the defendant, and monies lent and advanced to him, and on an account stated between him and the plaintiff as such assignee; and it was proved that the goods had in fact been sold by the bankrupt to the defendant, with the concurrence of, and for the benefit of two former assignees, whose appointment was afterwards ordered to be vacated by the Lord Chancellor, and the plaintiff was thereby appointed a new assignee in their stead:—*Held*, that the action was properly brought, and the declaration well framed, although it was objected, either that the former assignees should have been made parties, or the fact of their having been removed and the plaintiff substituted in their place, and that the sale was made previously to his appointment, should have been stated in the declaration. *Aldritt v. Kittridge*, *M.* 4 G. 4. *Page* 372

ATTACHMENT.

See SHERIFF.

1. An attachment for contempt, in not paying money pursuant to the Prothonotary's *allocatur*, on demand made by a third person, who acted under a power of attorney, may be supported on an affidavit stating that he shewed the original rule and *allocatur* to the party charged, at the time of the demand; and it seems that it was not necessary to shew him the

power of attorney. *Sed quere.* *Bass v. Maitland*, *E.* 4 G. 4.

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2. Where, on an application to strike two attorneys off the roll, and commit a third person to the *Fleet Prison* for practising in their names, he not being an attorney; the Court ordered the parties to be attached, and give bail to answer interrogatories before the Prothonotary, who reported them to be in contempt for not having satisfactorily answered the interrogatories put to them:—*Held*, that such report was not conclusive on the parties; but that they might take exceptions to any specific or material parts of it. And where, after the Prothonotary had made his report, it appeared, that certain books of account had not been laid before him, which tended to support the answers given by one of the parties; the Court ordered the Prothonotary to inspect them, but would not allow a clerk, who had made the entries therein, to be examined by the Prothonotary on an application made by the prosecutor for that purpose. *Isaacson, In re*, *T.* 4 G. 4. *Page* 214
3. Where a person was served with a *subpœna duces tecum* on the 3d July, by which he was required to attend the trial of a cause in *London* on the 2d of that month:—*Held*, that as a particular day was inserted therein, which had passed before the service; the Court could not interfere by granting an attachment for

non-compliance with the terms of the *subpœna*, although it was tested properly on the last day of the preceding Term, and the Sittings did not commence till the day on which the *subpœna* was dated. *Alexander v. Dixon*, M. 4 G. 4.

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4. The Court ordered an attachment to issue against a party for non-performance of an award, the submission having been made a rule of Court, although he resided in *France*, where the copy of the award and rule on which the application was founded, were served on him; on the ground, that the attachment was in the nature of a civil process: but it seems that it could not be available to the party suing it out. *Hopcraft v. Fermor*, M. 4 G. 4. 424

5. A personal demand is absolutely necessary to bring a person into contempt, in order to proceed against him by attachment:—Therefore, where a defendant was served with a rule of Court, requiring him to reinstate premises belonging to the plaintiff *forthwith*, according to an agreement entered into by him to that effect at the trial:—*Held*, that an attachment could not be issued against the defendant for disobedience of such rule, on being merely served with it by the plaintiff's agent; but that a personal demand should have been made on him to comply with it in terms, at the time of such service. *Dodington v. Hudson*, H. 4 & 5 G. 4. 510

6. But the defendant, on being afterwards served with the rule of Court, requiring him to reinstate the plaintiff's premises forthwith, said that he could not begin to set about it for three months, and an attachment was moved for against him four days after such service, on the ground that he had not then commenced to comply with the terms of the rule, the Court directed the attachment to issue, although it was sworn that it would have required three months to complete the reinstatement of the premises from the time of the service of the rule. *Dodington v. Hudson*, H. 4 & 5 G. 4. Page 610

ATTORNEY.

See ERROR.

1. Where, on the taxation of an attorney's bill, less than one-sixth part was taken off by the Prothonotary, by which he was entitled to the costs of the taxation:—*Held*, that he ought to have applied for them at the time, and that he could not afterwards have them allowed on motion;—the costs, as taxed, having been paid by his client, and an account between them settled and adjusted. *Whitfield v. James*, E. 4 G. 4. 40
2. Where the defendants' attorney, on their being sued by the plaintiff, undertook by letter to procure their signature to a *cognovit*, for the payment of debt and costs, which he failed to do; but the plaintiff afterwards said that he would proceed with the action:—*Held*, that this

zance of bail, and to which two *nils* were returned, on which judgment was signed and execution issued, the Court refused to set aside such judgment and execution, on the ground that the bail had no notice of the writs of *scire facias* having issued, although they lived in the county of *Middlesex*, as, by their entering into a recognizance, they made themselves personally liable; and as it was their duty to watch the proceedings in the sheriff's office. *Smith v. Crane, E. 4 G. 4.* Page 8

2. Where a person who came up to justify as bail had recently taken the benefit of the insolvent debtor's act, which was unknown to the defendant or his attorney, until the morning of justification, the Court would not allow time to add and justify another; as if bail are opposed, time can only be given where their justification is prevented by an act of God. *Watson's Bail, T. 4 G. 4.* 208

3. Time can only be given to add and justify another person as bail, where the party originally consenting to justify is prevented from attending by an unforeseen accident, or an act of God. *Wells' Bail, M. 4 G. 4.* 378

4. Where a person had taken a house, occupied by several tenants or lodgers, and from one of whom he had received rent, he is qualified to justify as bail, although he had not occupied the house himself. *Cosin v. Waterhouse, M. 4 G. 4.* 365

5. The Court will not set aside a rule for the allowance of bail, on affidavits, disclosing that they had been guilty of gross and wilful perjury when they came up to justify, although the application for that purpose was made on the day following that on which the offence was committed: the plaintiff's only remedy is by indictment against the bail, unless the defendant himself was privy to, or appeared to be implicated in the transaction. *Stockham v. French, M. 4 G. 4.* Page 381

6. Where, on opposing bail in error, one of them admitted that his son had told him that the attorney for the plaintiff in error had said, that if he (the father) became bail, he should come to no harm:—The Court ordered him to be rejected, and refused to allow further time to put in and justify other bail. *Capon v. Dillamore, H. 4 & 5 G. 4.* 516

7. Where, on examination of bail, it appeared that one of them lived in lodgings, but that he paid part of the rent and taxes of a house occupied by his partner as a trader: *Held*, that he might be considered as a house-keeper, so as to be qualified to justify as bail. *Savage v. Hall, H. 4 & 5 G. 4.* 525

8. A notice of justification of bail for the 2d of *February*, being a *dies non*, is irregular, as it ought to have been given for them to justify on the following day:—But the Court allowed time for the same bail to come

confined to finding 100*l.* as the damages sustained by the plaintiff for the loss on the sale of the premises, as they were laid under a *scilicet*, and proved at the trial to amount to 160*l.*, for which sum the verdict was given; and *lastly*, that the declaration was not bad in arrest of judgment, although it was objected that it was not alleged that the plaintiff had sustained any actual loss, or that the arbitrator would have decided that repairs were necessary, or that he would have awarded in favour of the plaintiff, in case the reference had been proceeded with. *Swannell v. Ellis*, *M.* 4 G. 4. Page 340

AVERAGE LOSS.

See COSTS, 4.

AVOWRY.

See REPLEVIN.

AWARD.

See ATTACHMENT, 4.

ATTORNEY, 6.

1. Where, by an order of reference, all matters in difference were referred to an arbitrator, who was to ascertain and certify what verdict ought to be given, and his certificate was to be entered up as the verdict of a jury; and he certified that a verdict should be entered for the plaintiff for a certain sum, and told the parties, that each should pay his own costs of the reference, which was acceded to by them;

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and on motion to set aside the certificate, the Court ordered the cause to be referred back to the same arbitrator; when he certified to the same effect, but omitted to give any direction as to the costs of the second reference in the last certificate: *Held*, that the plaintiff was entitled to them, as, in the absence of any specific direction to the contrary, such costs must follow the verdict as a matter of course. *Maokintosh v. Blyth*, *T.* 4 G. 4. Page 211

2. Where several underwriters to a policy had entered into a consolidation rule, by which they undertook to abide the event of the verdict, and the cause was referred by consent before trial, and the arbitrator awarded the aggregate sum due to the assured from the underwriters at large; the Court would not order it to be referred back to the arbitrator to insert the amount of the sum due and payable from each underwriter individually, without the consent of such underwriters. *Kynaston v. Liddell*, *T.* 4 G. 4. 223
3. Where on a motion to set aside an award, the affidavit of the arbitrator was not filed within the time limited by the Court, they refused to allow its being read. *Cleesby v. Peese*. 524, *n.*

BAIL.

See AMENDMENT, 1.

ARREST, 2.

1. Where two writs of *scire facias* had been sued out against the defendants on a recogni-

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zance of bail, and to which two *nihilis* were returned, on which judgment was signed and execution issued, the Court refused to set aside such judgment and execution, on the ground that the bail had no notice of the writs of *scire facias* having issued, although they lived in the county of *Middlesex*, as, by their entering into a recognizance, they made themselves personally liable; and as it was their duty to watch the proceedings in the sheriff's office. *Smith v. Crane, E. 4 G. 4.* Page 8

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8. A notice of justification of bail for the 2d of *February*, being a *dies non*, is irregular, as it ought to have been given for them to justify on the following day:—But the Court allowed time for the same bail to come

up and justify, on another notice being given for that purpose. *Heath v. Harris, H. 4 & 5 G. 4. Page 528*

BAIL BOND.

1. Where a married woman had contracted a considerable portion of the debt for which she was arrested and held to bail, viz. the board and education of a female child, without disclosing her marriage to the plaintiff, and she afterwards acted with duplicity in eluding payment, and eventually went to reside in France out of the jurisdiction of the Court; they refused on motion to order the bail bond to be delivered up to be cancelled, and a common appearance entered, but left her to plead her coverture. *Luden v. Justice, M. 4 G. 4. 346*
2. Where a defendant, whose name was John Thomas, had been arrested by the name of James Thomas, and signed a bail bond, with the initials J. T.—Held, that such signature was no waiver of the irregularity in the writ, and the Court ordered the bail bond to be set aside. *Coles v. Gunn, H. 4 & 5 G. 4. 526*

BAIL PIECE.

See AMENDMENT, 1.

BANKER.

See BOND, 2.

BANKRUPT.

See EVIDENCE, 2.
PRISONER, 5.

1. Where a trader, being possess-

ed of a beneficial lease, proposed, after an act of bankruptcy, to dispose of it to a purchaser, who refused to take it, unless the premises should be first discharged from all arrears of rent which were then due to the landlord, and the rent was afterwards paid to the latter out of the money which the purchaser had agreed to give for the lease, the landlord being aware of the situation of the bankrupt; and there being no property to distrain on the premises at the time, but the landlord having a right of re-entry, according to a proviso in the lease:—Held, that the assignee of the bankrupt could not recover from the landlord the rent so paid to him, in an action for money had and received, as the estate of the bankrupt had been benefited by such payment; and as the landlord had thereby waived his right to distrain, as well as to proceed by ejectment, for a breach of the proviso contained in the lease. *Mavor v. Croome, E. 4 G. 4. Page 171*

2. Where one of two partners being abroad, writs of *capias*, *alias*, and *pluries*, returnable in Michaelmas Term, 1812, and Hilary Term, 1813, were sued out against both, with a view to outlawry against the former; but a commission of bankruptcy having been sued out against the other partner resident in this country, the proceedings as to the outlawry were suspended; and the absent partner never returned to

this country until 1819, except by touching at *Deal*, in 1814, for a mere temporary purpose, on his passage from one foreign port to another; and in 1821 a fresh action was commenced against him in *K. B.*, for the same debt; but as he avoided an arrest, a commission of bankruptcy was issued against him in that year, and he afterwards commenced an action in this Court, to try the validity of the commission; and previously to the trial, but after the commission, continuances were entered up on the former writs, issued in 1812 and 1813, and regularly brought down to the term before the latter trial. —

Held, that the debt on which the commission was founded, was not barred by the statute of limitations, but that at the time of issuing the said commission, it was a good petitioning creditor's debt. *Gregory v. Hurrill*, *T. 4 G. 4. Page 189*

3. Where a bankrupt, after the issuing a commission against him, but before obtaining his certificate, promised a creditor who had not proved under the commission, to pay him the whole of his demand, notwithstanding the bankruptcy, and indorsed a bill of exchange to him for that purpose: — *Held*, that the certificate was no bar to an action brought on the bill; the debt due before the bankruptcy being a good consideration for the promise, and which would have been available, even if made after the certificate had been obtained.

Bris v. Braham, *T. 4 G. 4. Page 261*

4. Where the defendant ordered goods, to be paid for in ready money, and, on being applied to for payment by the vendor's agent, tendered him a bill of exchange, accepted by the vendor, and which had become due, and was dishonoured before the goods were ordered, and the agent at first refused to accept the bill in part payment, but afterwards took it to the vendor, who retained it: —

Held, in an action of *assumpsit* by the assignees of the vendor, to recover the value of the goods; that in the absence of any evidence of fraud, the delivery and retention of the bill were equivalent to payment. *Mayer v. Nias*, *T. 4 G. 4. 275*

5. Where a bond was given under the statute 4 Geo. 3, c. 38, s. 1, by a member of Parliament, being a trader, and two sureties, and judgment was obtained in the suit in which the bond was given, after the bankruptcy, but before certificate: — *Held*, that the bankruptcy and certificate were no discharge to the bond. *Campbell v. Jameson*, (*in error*), *T. 4 G. 4. 281*

6. Where, in an action of *assumpsit*, the declaration stated that the defendant was indebted to the plaintiff as assignee of *J. S.*, a bankrupt, for goods sold and delivered to the defendant, and monies lent and advanced to him, and on an account stated between him and the plaintiff as such assignee; and it was

2. Where, on the grant of an annuity, a considerable portion of the consideration money was retained by, or returned to the agent of the grantee, for the expenses of preparing the deeds and for journeys, &c.:—*Held*, that this was an illegal retainer, although the grantee swore that no part of the consideration money was retained or kept back by his direction, authority, or privity, (he should have gone further, and stated that none was returned); and the Court set aside the annuity, notwithstanding ten years had elapsed since it was granted, and the grantor had acquiesced in its payment during that period;—on the terms of an account being taken before the Prothonotary, who was to ascertain what sum might be due to the grantee in respect of principal and interest. *Williamson v. Goold*, *E. 4 G. 4.*

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3. Where a surety taken in execution, under a judgment entered up on a warrant of attorney, given by him to secure the payment of an annuity, obtained an order to be discharged out of custody on payment into Court of the balance which might be found due to the grantee, on taking an account before the Prothonotary; and the principal afterwards succeeded in setting aside the annuity deed and other securities on which it was founded, upon the ground of an illegal retainer of part of the consideration money, on

- payment of the balance which might be found to be due to the grantee, on an account to be taken by the Prothonotary; and the surety afterwards applied to be discharged out of custody, on the ground that the deeds were set aside as against his principal: the Court refused to interfere, unless he had previously paid the balance into Court, according to the terms of the first order, or would give security to the Prothonotary to cover the amount which might ultimately be found to be due from his principal to the grantee of the annuity. *Williamson v. Goold*, *Bart. T. 4 G. 4. Page 224*
4. Where persons were employed by the grantor to raise money by way of annuity, and by the grantees to pay the consideration money over to the grantor, and, at the time of the execution of the deeds to secure the annuity, such persons received back from the grantor, or retained a considerable portion of the consideration money for a debt alleged to be previously due to them from the grantor:—*Held*, that this was an illegal retainer, and the Court, on motion, ordered the securities to be set aside, on the terms of the grantor's paying what might be found to be due to the grantees in respect of principal and interest, although the latter had not received any part of the money so returned or retained, and although it was done without their direction, privity,

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tiff, and she afterwards acted with duplicity in eluding payment, and eventually went to reside out of the jurisdiction of the Court; they refused on motion to order the bail-bond to be delivered up to be cancelled and a common appearance entered, but left her to plead her coverture. *Luden v. Justice*, M. 4 G. 4.

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3. Where, in an action of *assumpsit* by a trustee for the breach of an agreement, by which the defendant and his wife had agreed to live separate, and the defendant had stipulated to pay the plaintiff a certain sum weekly for the use and support of his wife, in consideration of which, the plaintiff undertook to save the defendant harmless from all debts she might contract on his account; and the plaintiff sued the defendant to recover sums paid by the former on account of such allowance, and declarations of the wife were received in evidence at the trial, to shew that she had been living in adultery previously to, and at the time the payments in question were made; and the jury found a verdict for the defendant generally, as well as on the ground of adultery:—The Court granted a new trial; and it seems that such an agreement is legal, and that the fact of adultery cannot be given in evidence under the general issue, but must be pleaded specially.—*Quere*, also, whether such declarations were admissible in evidence, and

BOND.

whether the plaintiff ought not to have notice of the adultery previously to the commencement of the action. *Scholey v. Goodman*, M. 4 G. 4. Page 350

BILLS OF EXCHANGE.

See ASSUMPSIT, 1.

BANKRUPT, 3, 4, 8.

BOND, 2.

FORMER RECOVERY.

FRAUDS, STATUTE OF, 1, 2.

LIMITATIONS, STATUTE OF, 1.

PRACTICE, 6, 18, 19.

BILL OF SALE.

See EVIDENCE, 2.

BOND.

See ASSUMPSIT, 1.

BANKRUPT, 7.

1. Where a bond was given under the statute 4 Geo. 3, c. 33, s. 1, by a member of Parliament, being a trader, and two sureties, and judgment was obtained in the suit in which the bond was given, after the bankruptcy, but before certificate:—*Held*, that the bankruptcy and certificate were no discharge to the bond. *Campbell v. Jameson*, (in error), T. 4 G. 4. 281
2. Where the defendant as surety in a bond, which, after reciting that his principals A. B. and C. D. were bankers at *Sunderland*, was conditioned for the securing such sum or sums as should be advanced to meet bills of exchange drawn by A. B. and C. D., or either of them, on the plaintiffs, (the obligees), who were bankers in

London, under a penalty of 5000*l.*:—*Held, first*, that the bond having been given previously to the passing of the statute 48 Geo. 3, s. 140, was properly stamped with a 7*l.* stamp, as being applicable to the amount of the penalty under the statute 44 Geo. 3, c. 98. *Secondly*, that the bond did not extend beyond the continuance of the partnership between *A. B.* and *C. D.*; and, consequently, that the surety was not liable for the amount of bills drawn by *C. D.* after the death of *A. B.*; and *lastly*, that remittances made by the survivor after the death, must be appropriated in the first place in liquidation of the partnership balance then due, there being no balance struck or rest made in the accounts in the books of the obligees, and such remittances having been made on the general account, without any specific mode of application. *Simson v. Cooke*, *H. 4 & 5 G. 4.* Page 588

CANAL.

See FISHERY.

CERTIFICATE.

See APOTHECARY.

AWARD, 1.

BANKRUPT, 3, 5.

COSTS, 5.

PRISONER, 1.

CHARTER-PARTY.

See AFFIDAVIT TO HOLD TO BAIL, 1.

CHURCHWARDEN.

See ABATEMENT.

CLERK OF THE WARRANTS.

See ATTORNEY, 4.

COGNOVIT.

See ATTORNEY, 2.

COMPOSITION DEED.

See INSOLVENT DEBTOR, 3.

CONSIDERATION.

See ANNUITY, 2, 3, 4.

BANKRUPT, 3.

FRAUDS, STATUTE OF, 1, 2.

CONSOLIDATION RULE.

See AWARD, 2.

CONSPIRACY.

See NEW TRIAL, 3.

CONSTABLE.

See FALSE IMPRISONMENT, 2.

CONTEMPT.

See ATTACHMENT, 1, 5, 6.

CONTINUANCES.

See BANKRUPT, 2.

CONTRACT.

See FRAUDS, STATUTE OF.

COSTS.

See ATTORNEY, 1.

AWARD, 1.

1. Where, in a declaration of *assumpsit* by executors, con-

taining fourteen counts, founded on promises by the defendant to their testator, it was alleged in the fifteenth, that the defendant, after the death of the testator, accounted with the plaintiffs as executors, concerning divers other sums due from the defendant to the plaintiffs as executors as aforesaid, and then unpaid; and that the defendant being found in arrear upon that account, and indebted to the plaintiffs as executors, promised them as executors, to pay:—*Held*, that, on nonsuit they were liable to costs, as they might have sued for the cause of action, as stated in the latter count, in their own right. *Jones v. Jones*, E. 4 G. 4.

Page 146

2. Where, in trespass *quare clausum fregit*, some issues are found for the plaintiff, and others for the defendant, and the latter obtains a verdict on an issue which goes to the whole of the plaintiff's cause of action, he is entitled to the general costs of the cause, and the plaintiff to the costs of those issues only which are found for him, which extend only to the costs of the pleadings; the only exception being in an action of replevin, where both parties may be considered as actors. *Other v. Calvert*, T. 4 G. 4.

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3. The plaintiff and defendant must be both resident within the jurisdiction of the *Southwark* Court of Requests act, 22 Geo. 2, c. 47, in order to de-

prive the plaintiff of his costs under the sixth section of that statute. *Dillamore v. Capon*, M. 4 G. 4. Page 429

4. Where the plaintiffs in an action on a policy of insurance recovered for an average loss, and a new trial was granted on the terms, that the costs of the first should abide the event; and at the second trial the plaintiffs again recovered for an average loss only:—*Held*, that they were only entitled to the costs of the latter trial, and the defendant to the costs of neither. *Hudson v. Marjoribanks*, M. 4 G. 4.

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5. Where the plaintiff recovered 5s. damages in an action of trespass *vi et armis* for taking his cart, and the Judge certified under the statute 43 Eliz. c. 6, the Court would not refer it to the Prothonotary to tax the plaintiff his costs, although the cause of action arose within the jurisdiction of an inferior Court empowered to hold pleas of any suit not exceeding 50s. *Pyeburn v. Gibson*, H. 4 & 5 G. 4.

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6. Where the plaintiffs, as executors, brought an action on a bond given by the defendant to their testator, to which he pleaded a set off, which the plaintiffs were advised by counsel, after notice of trial had been given, would constitute a good defence to the action:—The Court allowed them to discontinue without payment of costs. *Stubbing v. Hammond*, H. 4 & 5 G. 4.

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DAMAGES.

COVENANT.

See APPRENTICE.

1. In order to create or constitute a covenant in a deed, it is not necessary that the word "covenant" should be expressly introduced. *Saltoun (Lady) v. Houstoun*, H. 4 & 5 G. 4.

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COVERTURE.

See BARON AND FEME.

CUSTOM.

See REFLEVIN, 1.

CUSTOM HOUSE OFFICER.

See LIMITATION OF ACTIONS.

DAMAGES.

See INTEREST OF MONEY, 1.

1. Where the plaintiff and defendant entered into articles of agreement, by which the former, in consideration of 2900*l.* agreed to sell to the latter the lease of a public house, as he then held the same, for the expiration of his term therein, and also his goods, fixtures, and effects, at a valuation; and the defendant agreed to take an assignment of the lease, and pay the above sum for it, as also the amount of the goods, fixtures, and effects, and take possession of the premises on a given day, when the plaintiff agreed to give up possession of the said premises, goods and effects, to assign licences, to repair or allow for all damaged outside windows, and to

DAMAGES.

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clear the rent and taxes to the day of quitting possession; and the expenses of the agreement were to be paid by the parties in equal moieties; and it was lastly agreed, that on either party's not fulfilling all and every part of the agreement, he should pay to the other 500*l.* thereby settled and fixed as liquidated damages:—Held, that this latter sum was not a mere penalty to cover such *damages as might* be actually incurred by the non-performance thereof, but that, on a breach by the defendant for refusing to accept an assignment of the lease, or take possession, he was liable to pay the plaintiff the full amount of that sum. *Reilly v. Jones*, T. 4 G. 4. Page 244

2. Where, in an action on the case against attorneys for negligence, the declaration stated, that the plaintiff had employed them to conduct an action of ejectment against his then tenant, for the recovery of premises forfeited to him by the tenant's breach of covenant to repair, and that afterwards, when the cause came on for trial, it was referred to an arbitrator, who was to decide what repairs were necessary to be done, and the costs of the cause were to abide the event of the award; that the arbitrator was afterwards ready to proceed with the reference, but that the defendants neglected to attend him, whereby the plaintiff was obliged to pay the defendants 60*l.* for his costs incurred in the action of ejectment, which the

tenant would otherwise have been obliged to pay; and that he sold the premises for much less, *to wit*, 100*l.* less than he otherwise would have done:—*Held*, that the jury were not confined to finding 100*l.* as the damages sustained by the plaintiff for the loss on the sale of the premises, as they were laid under a *scilicet*, and proved at the trial to amount to 160*l.* for which sum the verdict was given. *Swannell v. Ellis, M. 4 G. 4.* Page 340

DEBT.

See BANKRUPT, 7.

DEBTOR AND CREDITOR.

See INSOLVENT DEBTOR.

DECLARATION.

See ASSUMPSIT, 2.
ATTORNEY, 6.
PRACTICE, 7.
TRESPASS, 4.

DEED.

See INSOLVENT DEBTOR, 9.

1. Where *A.* and *B.* by deed, after reciting that *C.* had devised certain lands to them in strict settlement, with remainder over to *D.* on failure of issue male of *A.* and *B.*, and that as *C.* had not made any other provision for *D.*, in consideration of the esteem and regard *A.* and *B.* bore towards him, they agreed with *D.*, his executors or administrators, to pay him an annuity for twenty-one years, if *A.* and *B.*, or the survivor of them should so long live; or in case

D. should die within the term, then to his child or children, if any; but if there should be no child, to his then wife so long as she should continue a widow; and *D.* agreed, that in case he or his heirs should come into possession of the property left by *C.*, by virtue of the limitations in the will, or otherwise, he would repay to *A.* and *B.* all sums received by him, his children, or wife, on account of the annuity; and *D.* died within the term intestate, leaving one daughter, who also died intestate within the term, and his wife died in his lifetime:—*Held*, that *D.*'s administrator could not maintain an action against *B.* for non-payment of the annuity, after such respective deaths, on the ground that it was not the intention of the grantors that the annuity was to continue beyond the lives of the grantee and his family, as described in the deed, and that the grant to them was merely personal, and could not be carried farther. *Barford v. Stuckey, E. 4 G. 4.* Page 88

- 2 Where, by a deed entered into between *A. B.* of the first, *C. D.* of the second, and *E. F.* of the third part, after reciting that *A. B.* had for several years carried on business as a general merchant, and that it had been agreed that he should retire from business, and that *C. D.* and *E. F.* should become partners therein for ten years, to be computed from the day of the date of the deed; that

DEED.

the capital of the co-partnership should consist of 86,000*l.*, 24,000*l.* of which should be advanced by *A. B.* for *C. D.*, and 12,000*l.* was to be advanced by *E. F.* as his proportion, the deed proceeded to state, that, "whereas an account of all the debts and credits of *A. B.* in his business as a merchant, had been that day taken, and the balance in his favour amounted to 88,033*l.*; and whereas it had been agreed by and between *A. B.*, *C. D.*, and *E. F.*, that the whole of the debts and credits of *A. B.* should be received and paid by *C. D.* and *E. F.*; and that the balance of 88,033*l.* should be accounted for and paid by them in manner thereafter mentioned, and that for the better enabling them to collect and receive such credits, *A. B.* by indenture had assigned the same to them:—The indenture further witnessed, that, "it was thereby agreed, that in consideration of 12,000*l.* paid to *A. B.* by *E. F.*, as his share of the capital, and for raising 24,000*l.*, as *C. D.*'s share of such capital, the sum of 86,000*l.* part of the 88,033*l.* was to be retained by *C. D.* and *E. F.* as their capital or joint stock, and the remaining 2083*l.* paid by them to *A. B.* by instalments, at 6, 12, 18, and 24 months without interest, and that if any of the debts should prove bad, the loss should be borne by *C. D.* and *E. F.*:—*Held*, that this deed amounted to a covenant by them

DISTRESS.

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to pay the debts due from *A. B.* in his business, on the day of the date of the indenture; although it was contended, that there might have been a separate and independent parol agreement for the payment of such debts. *Saltoun (Lady) v. Houstoun*, *H. 4 & 5 G. 4.* Page 546

DEMISE.

See REPLEVIN, 1.

DEMURRER.

See PRACTICE, 11.

DEPOSITIONS.

See BANKRUPT, 8.

DEVISE.

See ANNUITY, 1.

1. Where a testator devised the rectory or parsonage of *Minster*, with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises *thereunto belonging*:—*Held*, that certain lands which had been acquired or purchased by the owners of the rectory, between the years 1608, and 1632, and had been uniformly occupied with it since, and were described in the several successive leases of the property;—passed under such devise. *Ongley v. Chambers*, *H. 4 & 5 G. 4.* 665

DISTRESS.

See BANKRUPT, 1.

WITNESS, 1.

1. Goods sent by the owner to his factor for sale, and depo-

sited by the latter in a warehouse belonging to a public wharf, at a weekly rent, until such sale could be effected, are not liable to be distrained for rent due from the wharfinger to his landlord in respect of the wharf and warehouse. *Thompson v. Mashiter*, T. 4 G. 4. Page 254

2. An action on the case cannot be maintained for detaining cattle distrained *damage feasant*, where a tender of sufficient amends was made after such cattle had been impounded. *Sheriff v. James*, M. 4 G. 4. 334

3. Although in general a tenant cannot dispute his landlord's title in an action of replevin, or use and occupation;—he may yet, under particular circumstances, shew that it has expired. Where, therefore, a tenant for life having a power to lease for twenty-one years, granted a lease for fifty-three years, which after several mesne assignments got into the possession of the defendants, who, after the death of the tenant for life, underlet them to the plaintiff's father; and in the following year, the person next in remainder, after giving the father and defendants notice to quit, granted a new lease to the father at an increased rent, which was paid for more than six years; at the expiration of which period, the defendants, having acquiesced to such payments being made in the interval, and without any previous demand of

rent, distrained on the plaintiff as the executrix of her father, for six years and a quarter's rent due to them under the original letting to her father:—*Held*, that such distress could not be supported, and that the plaintiff might deny the title of the defendants, as it must be taken to have been determined by the notice to quit to them, and their acquiescence to an adverse or superior title by their omitting to demand any rent for so long a period after the service of such notice. *Neave v. Moss*, M. 4 G. 4. Page 389

4. In an action on the case for an excessive distress, it is not incumbent on the plaintiff to prove the precise amount of rent due, it being laid in the declaration under a *videlicet*; and an arrangement between the parties respecting the sale of the goods seized, although after the distress, does not divest the tenant of his right of action. *Sells v. Hoare*, H. 4 & 5 G. 4. 451

EJECTMENT.

See BANKRUPT, 1.

1. Where, in the notice to appear, at the foot of a declaration in ejectment, the tenant was required to appear in eight days of St. *Hilary*, instead of *Hilary* Term generally, the Court would not allow final judgment to be signed, but left the party to bring a fresh action, as the notice was irregular and void. *Lackland d. Dowling v. Badland*, E. 4 G. 4. 79

EVIDENCE.

2. The visitors and feoffees of a free Grammar School, who had dismissed the schoolmaster for misconduct, or breach of the regulations of the deed of endowment, cannot maintain ejectment to recover possession of the school-house, unless they had determined the master's interest therein, by summoning him to appear before them previously to his dismissal, in order that he might be heard in answer to any charges that might be brought against him, and on which such dismissal might be founded. *Doe d. Thanet (Earl) v. Gartham, M. 4 G. 4.*

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ERROR.

1. Where a bill was filed against three attornies, (partners), for negligence, in which they were rightly named, but in entering the finding of the jury on the *postea*, part of the Christian name of one of them was omitted, and the judgment was, that "the plaintiff do recover against the said defendants:"—*Held*, that such omission was no ground of error. *May v. Pige, T. 4 G. 4.* 297.

EVIDENCE.

See ACTION ON THE CASE, 2.

APOTHECARY.

APPRENTICE.

LIMITATIONS, STATUTE OF, 1.

STAMPS.

WITNESS.

1. In an action for goods sold and delivered, the admissions of the defendant's wife, who serv-

EVIDENCE.

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ed in his shop and conducted the business of it in his absence, are admissible in evidence against her husband, although the goods were delivered previously to an application for payment, when she admitted that a certain sum was due to the plaintiff, and that she would pay it if he would make a deduction, to which she claimed to be entitled. *Clifford v. Burton, E. 4 G. 4.* Page 16

2. Where, in an action of trover, the plaintiff claimed under an assignment by bill of sale from the sheriff, on an execution issued by him against J. S., who afterwards became bankrupt, and the defendants, as his assignees, seized the goods by virtue of the commission, but did not defend the action as such, nor were proved to have acted in that character at the trial; it seems that they must be considered as strangers; and, consequently, that it was incumbent on the plaintiff to produce an examined copy of the judgment on which the writ of *fi. fa.* was grounded, as well as the writ itself, and the assignment to him from the sheriff. *Glasier v. Eve, E. 4 G. 4.* 46

3. Where, in an action on the case against attornies for negligence, the declaration stated, that the plaintiff had employed them to conduct an action of ejectment against his then tenant, for the recovery of premises forfeited to him by the tenant's breach of covenant

to repair, and that afterwards, when the cause came on for trial, it was referred to an arbitrator, who was to decide what repairs were necessary to be done, and the costs of the cause were to abide the event of the award; that the arbitrator was afterwards ready to proceed with the reference, but that the defendant neglected to attend him, whereby the plaintiff was obliged to pay the defendants 60*l.* for his costs incurred in the action of ejectment, which the tenant would otherwise have been obliged to pay; and that he sold the premises for much less, to wit, 108*l.* less, than he otherwise would have done:—*Held*, that it was not necessary in the action against the defendants, to produce the lease on which the ejectment was brought. *Swannell v. Ellis*, *M. 4 G. 4. Page 340*

4. Where, in an action of *assumpsit* by a trustee for the breach of an agreement, by which the defendant and his wife had agreed to live separate, and the defendant had stipulated to pay the plaintiff a certain sum weekly, for the use, benefit, and support of the defendant's wife, in consideration of which the plaintiff undertook to save the defendant harmless from all debts she might contract on his account; and the plaintiff sued the defendant, to recover sums paid by the former on account of such allowance; and declarations of the wife were received in evidence at the trial, to shew that she had

EXCESSIVE DISTRESS.

been living in adultery previously to and at the time the payments in question were made; and the jury found a verdict for the defendant generally, as well as on the ground of adultery; it seems that such an agreement is legal, and that the fact of adultery cannot be given in evidence under the general issue, but must be specially pleaded. *Quære* also, whether such declarations were admissible in evidence, and whether the plaintiff ought not to have had notice of the adultery previously to the commencement of the action. *Scholey v. Goodman*, *M. 4 G. 4.*

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5. Depositions taken under a commission of bankruptcy, are not conclusive evidence of a petitioning creditor's debt, under the statute 49 *Geo. 3. c. 121. s. 10.* Therefore, in an action by the assignee, where such debt was founded on a bill of exchange drawn by the bankrupt, and accepted previously to the issuing of the commission, and payable to the petitioning creditor; but his deposition in support of such debt, did not state that the bill had been dishonoured by the drawee, or notice thereof given to the bankrupt as drawer:—*Held*, that it was not of itself sufficient evidence to establish the petitioning creditor's debt. *Cooper v. Machin*, *H. 4 & 5 G. 4.* 536

EXCESSIVE DISTRESS.

See DISTRESS, 41.

EXECUTORS.

EXCISE OFFICER.

See LIMITATION OF ACTIONS.

EXECUTION.

See BAIL, 1.

EVIDENCE, 2.

PRISONER, 2, 3.

SHERIFF.

EXECUTORS.

See ANNUITY, 1.

ASSUMPSIT, 1.

DISTRESS, 3.

1. Where, in a declaration of *assumpsit* by executors, containing fourteen counts, founded on promises by the defendant to their testator, it was alleged in the fifteenth, that the defendant, after the death of the testator, accounted with the plaintiffs as executors, concerning divers other sums due from the defendant to the plaintiffs as executors as aforesaid, and then unpaid; and that the defendant being found in arrear upon that account, and indebted to the plaintiffs as executors, promised them, as executors, to pay:—*Held*, that on nonsuit they were liable to costs, as they might have sued for the cause of action, as stated in the latter count, in their own right. *Jones v. Jones*, *B. 4 G. 4.* Page 146

2. Where the plaintiffs as executors, brought an action on a bond given by the defendant to their testator, to which he pleaded a set off, which the plaintiffs were advised by counsel, after notice of trial had

FALSE IMPRISONMENT. 715

been given, would constitute a good defence to the action:—The Court allowed them to discontinue without payment of costs. *Stubbing v. Hammond*, *H. 4 & 5 G. 4.*

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FACTOR.

See DISTRESS, 1.

FALSE IMPRISONMENT.

1. Where, in an action of trespass for an assault and false imprisonment, the declaration contained two counts; and the defendant pleaded, 1st, the general issue; and 2dly, that he and one J. W., having justified as bail for the plaintiff in an action then pending, he arrested the plaintiff, to render him in discharge of the recognizance, and detained him in custody until he had satisfied the demand for which the latter action was brought, and the plaintiff replied *de injuriâ*; and it appeared in evidence, that the defendant, in addition to detaining the plaintiff until he had satisfied such demand, caused him to be detained an hour longer, and until he had given a security for the expenses incurred by the defendant's becoming bail:—*Held*, that this was one continuing trespass and imprisonment, and therefore, that the plaintiff ought either to have newly assigned or replied the excess, in order to entitle him to recover for the additional detention

or imprisonment, which was unjustifiable or illegal. *Lambert v. Hodgson*, T. 4 G. 4.

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2. Where the plaintiff entered a public house after it had been closed for the night, and refused to tell the occupier how he obtained admission, when he sent for a constable, and charged the plaintiff with felony;—on which he was detained in custody two days:—*Held*, that the occupier was not justified in making such a charge; and consequently, that to an action of trespass for false imprisonment, a plea stating that he was acting in aid of a constable in taking the plaintiff into custody, could not be supported;—his remedy was by turning him out of the house. *Rose v. Wilson*, M. 4 G. 4. 302

FELONY.

See FALSE IMPRISONMENT, 2.

FIERI FACIAS.

See EVIDENCE, 2.

FINE.

1. It is unnecessary to amend a fine by altering the Christian name of the deforciant from *Ellen* to *Eleanor*, where she had been always known by the former, although her real baptismal name was *Eleanor*. *Hext*, plaintiff, *Cockey*, deforciant, E. 4 G. 4. 15
2. Where premises were described in a fine to be situate at

Malden, in the county of *Essex*, it may be amended by adding the words “*St. Peter in*” before *Malden*, there being three parishes in that town. *Pring*, deforciant, E. 4 G. 4.

Page 163.

3. Where an attorney had omitted to pay his termage fees to the clerk of the warrants, in compliance with the rule of Court E. T. 31 Geo. 2:—*Held*, that the latter officer was justified in not allowing a warrant of attorney in passing a fine to be filed until the arrearages of such fees were paid. *Blackbourn*, plaintiff, *Brown*, deforciant, T. 4 G. 4. 229
4. A fine may be amended by describing the premises intended to be conveyed, to be situate in the parish of *A*. instead of the parish of *B*., where both were originally one parish, and afterwards separated into distinct parishes by act of Parliament. *Kinderley*, plaintiff; *Robinson*, deforciant, M. 4 G. 4. 334
5. Where the wife of a deforciant was improperly described by the name of *Maria* instead of *Mary Ann*, the Court allowed the right name to be substituted in the writ of covenant, *præcipe*, and concord, on an affidavit, stating, that she was an illiterate woman; and that her real name had not been ascertained at the time the fine was levied. *Woolley*, plaintiff; *Harrison*, deforciant, H. 4 & 5 G. 4. 449

FISHERY.

6. It seems that the affidavit of the acknowledgment of a fine taken at *Caen* in *Normandy*, cannot be sworn before the *British* consul resident there; the Mayor having previously refused to take such affidavit, on the ground that the proceedings were not written in the *French* language; at all events it must be shewn, that there was no other magistrate at *Caen* than the Mayor, before whom the affidavit might have been sworn. *Riddell*, plaintiff; *Nash*, defendant, *H. 4 & 5 G. 4. Page 632*

FIRE.

See INSURANCE, 1.

FISHERY.

1. Where the plaintiff and defendant had separate interests in two pieces of land, over which a reservoir was made, under the *Birmingham Canal Navigation Act*, the 11th section of which provided, "that it should be lawful for the owner or owners of the lands on which any such reservoir should be made, to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein;" and the 78th section provided, "that the owners of all lands through which the canal should be made, should be entitled to the right of fishery, in so much of the canal as should be made over or through their lands or grounds respectively:"—*Held*, that as the plaintiff and defendant had only a several right of fishing in

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the water over his own land, they were not tenants in common of the fish, by virtue of the 11th section; but that when the water in the reservoir was drawn off, each was entitled to the fish which might be left and taken on his own soil. *Snape v. Dobbs*, *E. 4 G. 4. Page 28*

FORMER RECOVERY.

1. Where, in an action against the defendant, as acceptor of a bill of exchange, he pleaded a plea of judgment recovered for the same debt, the Court refused to set it aside as being a sham plea, or permit the plaintiff to sign judgment, although it was sworn that the defendant had admitted the debt, and made repeated promises to the plaintiff to pay, after he had been served with process in the action. *Young v. Gadderer*, *M. 4 G. 4. 437*

FRAUD.

See NEW TRIAL, 5.

FRAUDS, STATUTE OF.

1. Where the plaintiff, being in advance to the defendant's son for the costs of part of a cargo of fish, in which the latter was partly interested, wrote to him, stating that he had drawn on him, and requesting him to accept bills, to be appropriated for the repayment to the plaintiff; and the defendant's son was, on the other hand, to remit the plaintiff the proceeds of the cargo, to meet the pay-

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ment of the acceptancers: and the son agreed to the contents of that letter, by a memorandum written and signed by him at the foot thereof: and the defendant afterwards, by a guarantie, written by him at the back of the same letter, agreed to pay to the plaintiff, or his bankers, all sums which might come to his hands, agreeably to the terms of such letter, and be responsible to the plaintiff for the proceeds that might be procured by his son for the cargo:—*Held*, in an action of *assumpsit* on the guarantie, that as it referred to and adopted the terms of the plaintiff's original letter to the defendant's son, and which were approved of by him, there was a sufficient memorandum of the consideration, within the statute of frauds.—*Stead v. Liddard*, *E. 4 G. 4.*

Page 2

2. Where the defendant signed and gave a guarantie to the plaintiff, stating that "the latter having chartered his ship to J.S., and that he having paid one half the freight, and given the plaintiff his acceptance for the remaining half, at four months date," the defendant engaged to be accountable to the plaintiff for the amount of the said acceptance, should it not be paid when due:—*Held*, that the consideration for the defendant's promise or undertaking was sufficiently expressed on the face of such guarantie, so as to bind him within the 4th section of the statute of frauds. *Pace v. Marsh*, *E. 4 G. 4.* 59

INDENTURE.

3. Where a master of a vessel entered into a parol agreement to carry the plaintiff's corn from A. to B., and that after having delivered it there he would proceed to C., and fetch a cargo of coals, which he would bring back and deliver to the plaintiff at A., at a certain price per chaldron:—*Held*, that this was not a contract or agreement for the sale of goods within the provisions of the statute 29 Car. 2, c. 3, s. 17. *Cobbold v. Cartou*, *H. 4 & 5 G. 4.* Page 456

FREIGHT.

See INSURANCE, 2.
SHIP, 4.

GOODS SOLD AND DELIVERED.

See AFFIDAVIT TO HOLD TO BAIL, 3
ASSUMPSIT, 2.
BANKRUPT, 4, 6.
BARON AND FEME, 1.

GRANT.

See ANNUITY.

GUARANTIE.

See FRAUDS, STATUTE OF, 1, 2.

HABEAS CORPUS.

See PRISONER, 2.

HUSBAND AND WIFE.

See BARON AND FEME.

INDEMNITY.

See SHERIFF, 3.

INDENTURE.

See APPRENTICE.

INSOLVENT DEBTOR.

INFANT.

See ASSUMPSIT, 1.

INFERIOR COURT.

See COSTS, 3, 5.

INITIALS.

See ARREST, 1.

INSOLVENT DEBTOR.

See BAIL, 2.

1. An officer of the Insolvent Debtors' Court, who has been appointed to and accepted the office of provisional assignee, under the insolvent debtors' act, 53 G. 3, c. 102, must, by such assignment, be taken to have consented to accept the estate and other property of the insolvent, within the meaning of the 18th section of that statute, as he has no discretion to refuse such assignment: *Crofts v. Pick, M. 4 G. 4. Page 384*
2. Where the plaintiff having obtained a verdict against the defendant, he surrendered himself to prison in discharge of his bail, and gave notice to the plaintiff that he intended to apply for his discharge under the insolvent debtors' act, and that Court afterwards ordered that he should be imprisoned at the suit of some one or more of his creditors for fraud; and the plaintiff afterwards died intestate, and his brother took out letters of administration to his effects:—*Held*, that the defendant was not entitled to be

INSURANCE. 719

- discharged, on the ground that the suit had abated by the death of the original plaintiff, although no judgment had been signed or entered up, either by him in his life-time, or his administrator since his death, as they were not bound to proceed further against the defendant by virtue of the rule of Court, *Michaelmas Term, 3 Geo. 4. Holmes v. Murcott, H. 4 & 5 G. 4. Page 529*
3. Where the plaintiff executed a deed of composition, which contained a proviso, that in case *all the creditors* did not accede to the terms therein proposed, and execute the deed within a certain time from the date thereof, it was to be void; and one of the creditors afterwards received a sum from the defendant in full satisfaction of his demand, without acceding to the proposed arrangement, or executing the deed:—*Held*, that this was a fraud on the general creditors, and did not prevent the plaintiff from recovering his original demand, although he had executed the deed. *Spooner v. Whiston, H. 4 & 5 G. 4. 580*

INSPECTION OF PAPERS.

See ATTACHMENT, 2.
PRACTICE, 18.

INSURANCE.

See COSTS, 4.
NEW TRIAL, 5.

1. Where, in an action on a po-
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licy of insurance to recover a loss sustained by fire, the defendant as Director of the company, endeavoured to establish that the plaintiff had wilfully set fire to the premises, and the Judge directed the jury, that they should be satisfied that the crime imputed to the plaintiff was as fully and satisfactorily proved and established, as would warrant them in finding him guilty in case a criminal charge had been preferred against him for the same offence:—*Held*, that such direction was right. *Thurtell v. Beaumont*, H. 4 & 5 G. 4.

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2. In an action on a policy on freight, at and from the termination of the vessel's outward voyage at *New South Wales* and *Van Dieman's Land*, to her ports of discharge and loading in *India* and the *East Indian Islands*:—*Held*, that the *Mauritius* was not in *India*, nor an *Indian Island* within the terms of the policy:—

But it was afterwards determined to be so. *Robertson v. Clarke*, H. 4 & 5 G. 4. 622

3. A misdescription of the person to whom a licence from the Crown to trade with an enemy is granted, does not invalidate such licence, as where he was described to be of *London*, merchant, whereas he was resident at the time at *Heligoland*, but on the point of coming to reside in this country. *Lemcke v. Vaughan*, H. 4 & 5 G. 4.

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JUDGE'S ORDER.

INTEREST OF MONEY.

See PRACTICE, 6.

1. Where a Judge at chambers refused to allow interest on a judgment for damages in an action of *assumpsit* on a special agreement for the purchase of timber at a certain rate *per load*; on the ground that the original debt would not carry interest, and a Judge's order was accordingly made for staying the proceedings in the action on the judgment, on payment of the sum recovered with costs: the Court refused to discharge such order, the plaintiff having afterwards complied with the terms of it, by accepting such sum and costs. *Butler v. Stoveld*, M. 4 G. 4. Page 412

INTERROGATORIES.

See ATTACHMENT, 2.

ISSUABLE PLEA.

See PRACTICE, 11.

JOINDER OF PARTIES.

See ABATEMENT.
ASSUMPSIT, 2.

JUDGMENT.

See EVIDENCE, 2.
INTEREST OF MONEY.
PRACTICE, 3, 9.

JUDGE'S ORDER.

See INTEREST OF MONEY.
PRACTICE, 2, 9.

JURISDICTION.

See COSTS, 3, 5.

PRISONER, 2.

LANDLORD AND TENANT.

See BANKRUPT, 1.

DAMAGES, 1.

EJECTMENT.

WITNESS, 1.

1. Although in general a tenant cannot dispute his landlord's title in an action of replevin, or use and occupation; he may yet, under particular circumstances, shew that it has expired. Where, therefore, a tenant for life having a power to lease for 21 years, granted a lease for 53 years, which, after several mesne assignments, got into the possession of the defendants, who, after the death of the tenant for life, under-let them to the plaintiff's father, and in the following year the person next in remainder, after giving the father and defendants notice to quit, granted a new lease to the father at an increased rent, which was paid for more than 6 years; at the expiration of which period, the defendants having acquiesced to such payments being made in the interval, and without any previous demand of rent, distrained on the plaintiff as the executrix of her father, for six years and a quarter's rent due to them under the original letting to her father:—*Held*, that such distress could not be supported, and that the plaintiff might deny the title of the defendants, as it

must be taken to have been determined by the notice to quit to them, and their acquiescence to an adverse or superior title, by their omitting to demand any rent for so long a period after the service of such notice. *Neave v. Moss*, M. 4 G. 4. Page 389

LEASE.

See BANKRUPT, 1.

DAMAGES, 1.

DISTRESS, 3.

LIBEL.

1. Where the plaintiff, a dissenting minister, charged the proprietors of a newspaper, with publishing therein the following libel against him, viz. "A serious misunderstanding has recently taken place amongst the independent dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown out from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously."—And the defendants, in justification, pleaded, that the plaintiff had just before his preaching and delivering a certain discourse or sermon, addressed by him as such pastor or minister to a certain congregation of dissenters in a certain chapel; and that whilst he was officiating in the said chapel as pastor or minister, spoke and published

722 LICENCE TO TRADE.

“from a certain part or station of the said chapel assigned to him as pastor and minister, for the preaching and delivery of the discourse or sermon, to and in the presence of the congregation, of and concerning one *M. F.*, these scandalous words following:—“I have something to say, which I have thought of saying for some time, *viz.* the improper conduct of one of the female teachers, her name is Miss *F.*, her conduct is a bad example and disgrace to the school, and if any of the children dare ask her to go home, she shall be turned out of the school and never enter it again; Miss *F.* does more harm than good;” and thereby gave great offence to divers of the dissenters, *to wit*, one *A. B.*, one *C. D.*, and one *E. F.*, and occasioned a serious misunderstanding amongst the dissenters, in the declaration mentioned. The jury having found a verdict for the defendants on this plea:—*Held*, on a motion in arrest of judgment, that it was a sufficient answer to the libel as charged in the declaration. *Edwards v. Bell*, *H. 4 & 5 G. 4.* Page 467

LETTERS.

See FRAUDS, STATUTE OF.

LIMITATIONS, STATUTE OF.

LICENCE TO TRADE.

1. A misdescription of the person to whom a licence from the

LIMITATION OF ACTIONS.

Crown to trade with an enemy is granted, does not invalidate such licence. *Lemche v. Faughan*, *H. 4 & 5 G. 4.*

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LIMITATION OF ACTIONS.

1. The 23d section of the statute 28 *Geo. 3, c. 37*, enacts, that if any action shall be brought against any person for any thing by him done in pursuance of that or any other act relating to his Majesty's customs or excise; such action must be commenced within three months next after the matter or thing done. Where, therefore, an officer in the preventive service boarded a ship on the 23d *August*, and left three men on board, and on the following morning, returned and told the master he had seized her, and detained her until the 20th *September* following:—*Held*, that an action of trespass for the seizure must be brought within three months from the day of boarding the vessel on the 23d *August*, as the act of seizure on that day must be considered as the matter or thing done. *Crook v. M'Tavish*, *T. 4 G. 4.* 266, n.
2. The 25th section of that statute enacts, that no writ shall be sued out against such person, until one calendar month next after notice in writing of such action shall have been delivered to him. And the 26th section enacts, that it shall be lawful for such person, at any time within one

LIMITATIONS, STAT. OF. LIQUIDATED DAMAGES. 799

calendar month after such notice, to tender amends to the person complaining:—*Held*, that an action brought against a revenue officer, under the 23d section of the statute, must be commenced within three lunar months next after the matter or thing done. *Crook v. MTavish*, T. 4 G. 4.

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LIMITATIONS, STATUTE OF.

1. Where, to an action on a promissory note, the defendant pleaded the statute of limitations, and the plaintiff gave in evidence a letter written by the defendant to him, stating, that "business called him to L., but should he be fortunate in his adventures, the plaintiff might depend on seeing him at B., (the place of the plaintiff's residence), otherwise, that he must arrange matters with him as circumstances would permit;" and it was not shewn that the letter referred to any other transaction between the parties:—*Held*, that it was properly left to the jury to determine, whether it related to the note, so as to amount to a sufficient acknowledgment to take the case out of the statute; and they having found in the affirmative, held, that their verdict was conclusive. *Frost v. Bengough*, E. 4 G. 4. 180
2. Where one of two partners being abroad, writs of *capias*, *alias*, and *pluries*, returnable in *Michaelmas Term*, 1812,

and *Hilary Term*, 1813, were sued out against both, with a view to outlawry against the former; but a commission of bankruptcy having been sued out against the other partner resident in this country, the proceedings as to the outlawry were suspended; and the absent partner never returned to this country until 1819, except by touching at *Deal* in 1814, for a mere temporary purpose, on his passage from one foreign port to another; and in 1821, a fresh action was commenced against him in *K. B.* for the same debt; but as he avoided an arrest, a commission of bankruptcy was issued against him in that year, and he afterwards commenced an action in this Court to try the validity of the commission, and previously to the trial, but after the commission, continuances were entered up on the former writs issued in 1812, and 1813, and regularly brought down to the term before the latter trial:—*Held*, that the debt on which the commission was founded, was not barred by the statute of limitations. And it seems that the touching at *Deal*, was not a return to this country from beyond the seas, within the meaning of the statute 21 Jac. 1, c. 18, ss. 3, 7. *Gregory v. Hurrill*, T. 4 G. 4. Page 189

LIQUIDATED DAMAGES

See DAMAGES, 1.

724 NEW TRIAL.

LORDS' ACT.

See PRISONER, 5.

MEMBER OF PARLIAMENT.

See BANKRUPT, 5.

MEMORANDA, 1, 190, 331, 448.

MONEY HAD & RECEIVED.

See AFFIDAVIT TO HOLD TO BAIL 2

ASSUMPSIT, 1,

BANKRUPT, 1.

MONEY LENT.

See AFFIDAVIT TO HOLD TO BAIL 2

MONTH.

See LIMITATION OF ACTIONS, 2.

NEGLIGENCE.

See TRESPASS, 1.

NEW ASSIGNMENT.

See FALSE IMPRISONMENT, 1.

TRESPASS, 2.

NEW TRIAL.

See COSTS, 4.

PRACTICE, 16.

WARRANTY.

1. No person can be excused of committing a trespass, unless he can justify that the act complained of arose entirely without his default. Where, therefore, in trespass for an injury done to the plaintiff's horse, in consequence of the defendant's driving a gig against it, it was proved, that the defendant drove a high spirited horse, unskilfully, and without a curb-chain; and the defendant plead-

NEW TRIAL.

ed, *first*, not guilty; and *secondly*, that his horse took fright and became ungovernable, in consequence of a cart's being driven furiously against it, which was not supported by evidence; and the Judge was of opinion, that the defendant was liable, although he might not have been guilty of an act of negligence or want of caution, and the jury found a verdict for the plaintiff.—The Court refused to grant a new trial, which was moved for on the ground that it should have been left to them to say, whether, under all the circumstances, the accident was unavoidable, or occasioned by the negligence of the defendant. *Wakeman v. Robinson, E. 4 G. 4. Page 63.*

2. Where, in an action for use and occupation, the jury found a verdict for 11l. only, but contrary to the opinion of the Judge, the Court refused to grant a new trial, unless it appeared that such verdict was founded on a mistake of law. *Green v. Speakman, M. 4 G. 4. 839*

3. Where, in an action of *assumpsit* by a trustee for the breach of an agreement, by which the defendant and his wife had agreed to live separate, and the defendant had stipulated to pay the plaintiff a certain sum weekly for the use, benefit, and support of his wife; in consideration of which, the plaintiff undertook to save the defendant harmless from all debts she might contract on

his account; and the plaintiff sued the defendant to recover sums paid by the former on account of such allowance; and declarations of the wife were received in evidence at the trial, to shew that she had been living in adultery previously to and at the time the payments in question were made; and the jury found a verdict for the defendant generally, as well as on the ground of adultery:—The Court granted a new trial, and it seems that such an agreement is legal, and that the fact of adultery cannot be given in evidence under the general issue, but must be specially pleaded. *Scholey v. Goodman*, M. 4 G. 4. Page 350

4. Where, in a writ of waste founded on the statute of Gloucester, 6 Edw. 1. c. 5, it appeared, that the defendant, a tenant for life, had cut down trees on the estate at three different times, the last of which was more than four years before the writ was sued out, and the plaintiff's witnesses admitted, that several of such trees had been felled for the benefit of the estate, and it was left to the jury to say, whether they thought the felling of the trees had been injurious to the inheritance, and if so, that they should find a verdict for the plaintiffs; but that if they should be of opinion that they were cut down *bonâ fide*, and with a view to improve the estate, then for the defendant; and the jury accordingly found a ver-

dict for the latter: the Court granted a new trial. *Redfern v. Smith*, M. 4 G. 4. 443

5. Where, in an action on a policy of insurance to recover a loss sustained by fire, the defendant, as director of the company, endeavoured to establish, that the plaintiff had wilfully set fire to the premises, and the judge directed the jury, that they should be satisfied that the crime imputed to the plaintiff was as fully and satisfactorily proved and established, as would warrant them in finding him guilty, in case a criminal charge had been preferred against him for the same offence:—*Held*, that such direction was right, and the Court refused to grant a new trial, although, after a verdict for the plaintiff, a grand jury had found a bill against him and others for a conspiracy to defraud the insurance company; and affidavits were produced, imputing perjury to the plaintiff's witnesses, and disclosing the nature of the conspiracy, and also tending to shew that the plaintiff's claim was founded in fraud, which was not known to the defendant at the time of the trial. *Thurtell v. Beaumont*, H. 4 & 5 G. 4. Page 612

NON-JOINDER.

See ABATEMENT.

NON-PROS.

See AFFIDAVIT, 1.

PAYMENT.

NOTICE.

See BAIL, 8.
EJECTMENT, 1.

NOTICE OF ACTION.

See SHERIFF, 2.

NOTICE OF DECLARATION.

See PRACTICE, 7.

NOTICE TO QUIT.

See DISTRESS, 3.
EJECTMENT, 2.
LANDLORD & TENANT, 1.

OATH.

See APPRENTICE.

OFFICER.

See ARREST, 2.
ATTORNEY.
LIMITATION OF ACTIONS.

ORDER OF REFERENCE.

See AWARD, 1.

OUTLAWRY.

See BANKRUPT, 2.

PARTNERS.

See BANKRUPT, 2.
BOND, 2.
DEED, 2.

PAYMENT.

See BANKRUPT, 4.

1. Where the defendant, as surety in a bond, which after reciting that his principals *A. B.* and *C. D.* were bankers at *Sunderland*, was conditioned for the securing such sum or sums as should be advanced

PENALTY.

to meet bills of exchange drawn by *A. B.* and *C. D.*, or either of them, on the plaintiffs, (the obligees) who were bankers in *London*, under a penalty of 5000*l.*:—*Held*, that remittances made by *C. D.*, after the death of *A. B.*, must be appropriated in the first place in liquidation of the partnership balance then due, there being no balance struck or rest made in the accounts in the books of the obligees, and such remittances having been made on the general account, without any specific mode of application. *Simson v. Cooke*, *H.* 4 & 5 G. 4. Page 588

PENALTY.

See BOND, 2.

1. Where the plaintiff and defendant entered into articles of agreement, by which the former, in consideration of 2300*l.*, agreed to sell to the latter the lease of a public house, as he then held the same, for the expiration of his term therein, and also his goods, fixtures, and effects at a valuation; and the defendant agreed to take an assignment of the lease, and pay the above sum for it, as also the amount of the goods, fixtures, and effects, and take possession of the premises on a given day, when the plaintiff agreed to give up possession of the said premises, goods, and effects, to assign licences, to repair or allow for all damaged outside windows, and to clear the rent and

taxes to the day of quitting possession; and the expenses of the agreement were to be paid by the parties in equal moieties; and it was lastly agreed, that on either party's not fulfilling all and every part of the agreement, he should pay to the other 500*l.*, thereby settled and fixed as liquidated damages:—*Held*, that this latter sum was not a mere penalty to cover such damages as might be actually incurred by the non-performance thereof, but, that, on a breach by the defendant for refusing to accept an assignment of the lease, or take possession, he was liable to pay the plaintiff the full amount of that sum. *Reilly v. Jones, T. 4 G. 4.* Page 244

PETITIONING CREDITOR'S DEBT.

See BANKRUPT, 2, 8.

PERJURY.

See BAIL, 5.

PLEADING.

See ABATEMENT.

ACTION ON THE CASE, 2.

ADULTERY.

AMENDMENT, 2, 3.

ASSUMPSIT, 2.

ATTORNEY, 6.

BAIL BOND, 1.

BANKRUPT, 6.

COSTS, 1, 2.

ERROR.

EXECUTORS, 1.

FALSE IMPRISONMENT, 1, 2.

LIBEL.

PRACTICE.

REPLEVIN.

TRESPASS.

1. Where, in replavin, for taking the plaintiff's cow, the defendant avowed, that he being seised of a messuage, to which common of pasture was appurtenant, distrained the said cow, *damage feasant*; and the plaintiff pleaded in bar, that there was a custom that a person seised in fee of the messuage might demise the right of common of pasture, independently of the actual occupation of such messuage; and that there had been a demise according to the custom:—*Held*, that such plea was bad on general demurrer, as the nature of the custom should be set out with precision and certainty, and that it should appear on the face of the plea, whether the demise was *by deed* or not; and it seems that a custom to demise such right by parol cannot be supported, as it is in the nature of an incorporeal hereditament, which cannot be demised without deed. *Lashbury v. Arnold, E. 4 G. 4.* 72

2. Where, in an action on the case, against attornies for negligence, the declaration stated, that the plaintiff had employed them to conduct an action of ejectment against his then tenant, for the recovery of premises forfeited to him, by the tenant's breach of covenant to repair; and that afterwards, when the cause came on for trial, it was referred to an arbitrator, who was to decide

what repairs were necessary to be done, and the costs of the cause were to abide the event of the award; that the arbitrator was afterwards ready to proceed with the reference, but that the defendants neglected to attend him, whereby the plaintiff was obliged to pay the defendant 60*l.* for his costs, incurred in the action of ejectment, which the tenant would otherwise have been obliged to pay, and that he sold the premises for much less, *to wit*, 100*l.* less than he otherwise would have done:—*Held*, that the declaration was not bad in arrest of judgment, although it was objected that it was not alleged that the plaintiff had sustained any actual loss, or that the arbitrator would have decided that repairs were necessary, or that he would have awarded in favour of the plaintiff, in case the reference had been proceeded with. *Swainnell v. Ellis*, *M. 4 G. 4.* 340

PLEDGES.

See REPLEVIN BOND, 1.

POLICY.

See INSURANCE.

POSTEA.

See ERROR, 1.

PRACTICE, 3.

POWER OF ATTORNEY.

See ATTACHMENT, 1.

PRACTICE.

See ABATEMENT.

AFFIDAVIT.

AMENDMENT.

ARREST.

ATTACHMENT

ATTORNEY.

AWARD.

BAIL.

BAIL BOND.

BANKRUPT, 2.

BARON AND FEME.

COSTS.

DAMAGES.

EJECTMENT, 1.

ERROR.

INSOLVENT DEBTOR.

INTEREST OF MONEY.

NEW TRIAL.

PRISONER.

SCIRE FACIAS.

SHERIFF.

STAMPS.

WARDEN OF THE FLEET.

1. If a rule of this Court has been drawn up improvidently, or by mistake of the officer, it may be discharged on terms. *Brooks v. Weston*, *E. 4 G. 4.* Page 87
2. Where the defendant, having applied for a judge's order to stay proceedings on payment of debt and costs, gave an undertaking to pay them on or before a given day, on which the order was granted, and the costs were afterwards taxed, but the defendant refused to pay:—*Held*, that the plaintiff could not compel the defendant to make such payment, although the undertaking to do so was made before the order, as the latter was conditional in terms; and that if it were not complied with, the plaintiff might proceed in the action as if no such order had been made. *Hayman v. Bach*, *R. 4 G. 4.*

3. Judgment is not final by the Prothonotary's marking the *postea* on the record; but on his completing the taxation of costs by inserting their amount in the *allocatur*. *Butler v. Bulkeley*, E. 4 G. 4. Page 104

4. The Court refused to stay proceedings in an action of trover, on an affidavit by the defendant that the plaintiff's cause of action did not amount to forty shillings, the amount of the value of the article sought to be recovered by such action being mere matter of calculation, to be ascertained by a jury. *Lowe v. Lowe*, T. 4 G. 4.

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5. Where an attorney had omitted to pay his termage fees to the clerk of the warrants, in compliance with the rule of Court E. T. 31 Geo. 2.—*Held*, that the latter officer was justified in not allowing a warrant of attorney in passing a fine to be filed, until the arrearages of such fees were paid. *Blackbourne*, plaintiff; *Brown*, defendant. T. 4 G. 4.

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6. Where a declaration on two bills of exchange contained a count on each, as well as all the money counts, and a count for interest: the Court refused to strike out the latter, as being unnecessary or superfluous. *Thomas v. Ancombe*, T. 4 G.

4.

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7. The Court will not allow the affixing a notice of declaration in the Prothonotary's office, to be good service, although it was sworn that the defendant had no fixed place of residence, and that the plaintiff did not

know where to find him. *Kemp v. Powell*, T. 4 G. 4.

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8. Where a bill was filed against three attornies (partners) for negligence, in which they were rightly named, but in entering the finding of the jury on the *postea*, part of the Christian name of one of them was omitted, and the judgment was, that "the plaintiff do recover against the said defendants:"—*Held*, that such omission was no ground of error. *May v. Pige*, T. 4 G. 4.*

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9. Where the plaintiff declared in trespass that the defendant broke and entered his close, and broke open the gates thereof, and also broke and entered his house, and there seized and took divers of the plaintiff's goods and chattels, *to wit*, one hundred articles of furniture, and one hundred articles of wearing apparel, without describing their nature or quality, and the defendant being under a Judge's order to plead issuably, demurred generally to the whole declaration; and the plaintiff signed judgment as for want of a plea, the court ordered it to be set aside with costs, as the demurrer went to the substance of the declaration, the goods taken having been insufficiently described therein. *Holmes v. Hodgson*, M. 4 G. A.

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10. Where a Judge at Chambers refused to allow interest on a judgment for damages, in an action of *assumpsit* on a special agreement for the purchase of timber at a certain rate *per load*; on the ground that the original

debt would not carry interest, and a Judge's order was accordingly made for staying the proceedings in the action on the judgment, on payment of the sum recovered with costs: the Court refused to discharge such order, the plaintiff having afterwards complied with the terms of it, by accepting such sum and costs. *Butler v. Stoveld*, M. 4 G. 4. Page 412

11. If a defendant be under terms of pleading issuably, he cannot assign special causes of demurrer, although the causes assigned are matters of substance, and of which he might have availed himself under a general demurrer. *Blicke v. Dymoke*, M. 4 G. 4. 427

12. Where the plaintiff obtained judgment against the defendant in 1802, which was satisfied in 1806, and the plaintiff died intestate in 1821:—The Court would not allow satisfaction to be entered on the roll, on an affidavit of the defendant's attorney, that the plaintiff had received from the defendant a certain sum in full satisfaction of his demand, it appearing that administration had not been taken out to the plaintiff's effects. *Speack v. Slade*, H. 4 & 5 G. 4. 461

13. The Court will not rescind or set aside a rule, on a suggestion, that at the time of discussion, the parties omitted to state the clause of a particular statute to counsel, which might have affected the judgment or decision of the Court, as such clause should have been presented to their notice at the

time the rule was discussed. *Dillamore v. Capon*, H. 4 & 5 G. 4. Page 462

14. Affidavits which were required by an enlarged rule to be filed a week before the commencement of the term, may, under circumstances, be used by leave of the court, although they were not filed within the time specified in such rule. *Harding v. Austen*, H. 4 & 5 G. 4. 523

And see *Cleesby v. Pease*, 524, n. 15. Where a defendant, whose name was *John Thomas*, had been arrested by the name of *James Thomas*, and signed a bail bond with the initials J. T.:—*Held*, that such signature was no waiver of the irregularity in the writ, and the Court ordered the bail bond to be set aside. *Coles v. Gunn*, H. 4 & 5 G. 4. 526

16. Where the plaintiff obtained a rule for a new trial, but neglected to carry the cause down for more than four terms, the Court would not discharge the rule on motion, unless a term's notice of such motion had been previously given. *Tipton v. Meek*, H. 4 & 5 G. 4. 579

17. The Court allowed several avowries in repelvin to be amended, by altering the name and description of the *locus in quo*, and stating the holding to have been for a year instead of half a year, and also by adding new avowries varying the amount of the rent, although issue had been joined and notice of trial given and countermanded, and more than two terms had elapsed previ-

ously to the application for the amendment. *Prior v. Buckingham (Duke)*, E. 4 & 5 G. 4.

Page 584

18. In an action against the defendant as acceptor of a bill of exchange, the Court will not compel the plaintiff to deposit it in the hands of the Prothonotary, to enable the defendant to inspect it, in order to ascertain whether his signature to it had been forged. *Hilliard v. Smith*, H. 4 & 5 G. 4. 586

19. Where, in an action against the defendant as acceptor of a bill of exchange, he pleaded a plea of judgment recovered for the same debt, the Court refused to set it aside, as being a sham plea, or permit the plaintiff to sign judgment, although it was sworn that the defendant had admitted the debt and made repeated promises to the plaintiff to pay, after he had been served with process in the action. *Young v. Gadderer*, M. 4 G. 4.

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PRISONER.

See INSOLVENT DEBTOR.

1. On a motion for the discharge of a prisoner under the statute 48 Geo. 3, c. 123, s. 1, the Court required the record to be examined by the officer (the gaoler's certificate not being produced), to ascertain whether the judgment had been entered up for a less sum than 20*l.*, and whether the defendant had lain in prison twelve months by virtue of such judgment. The affidavit of the defendant as to these facts is not sufficient, and the rule nisi can only be

granted in the first instance. *Findon v. Horton*, E. 4 G. 4.

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2. The Court has no jurisdiction to bring up a defendant in custody on a criminal charge, in order to discharge him as to a civil suit, on the ground of the plaintiff's not having proceeded to charge him in execution in due time; as the Court cannot change the custody, and recommit a defendant upon the criminal matter. It is otherwise in the King's Bench, as a *habeas corpus* may be sued out on the crown side of that Court. *Freeman v. Weston*, E. 4 G. 4. 81

3. The Court will not discharge a defendant out of custody in execution at the suit of a plaintiff, although the application was not made until eighteen months after the death of the latter; it appearing that he had appointed executors who were still alive, and had not assented to the discharge. *Dunford v. Gouldsmith*, E. 4 G. 4. 145

4. The clerk of the papers in the Fleet prison is entitled to a fee of 2*s.* 6*d.* on every action from which a prisoner is discharged, and which is payable under the rule of Court Easter and Trinity Terms, 1727: and the Court refused to order the Warden to return a sum taken by him on the discharge of a prisoner on account of such fees. *Rockfort, Ex parte*, E. 4 G. 4.

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5. Where, on a prisoner's being brought up to be discharged under the Lords' Act, it ap-

peared, that a commission of bankruptcy had been issued against him since his arrest and imprisonment, and that he had not passed his final examination, the Court ordered him to be remanded until such examination had taken place; and, on being afterwards brought up, and it appearing that he had passed it to the satisfaction of the commissioners, and that a commission had been awarded accordingly, he was ordered to be discharged on inserting an assignment in his schedule to the plaintiff of all his estate, title, and interest in the property therein mentioned, subject to the commission, and the payment or satisfaction of his debts under it. *Nunney v. Hall*, *M. 4 G. 4.* 423

PROCEEDINGS, WHERE STAYED.

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PROMISSORY NOTE.

See LIMITATIONS, STATUTE OF, 1.

PROTHONOTARY.

See ATTACHMENT, 2.
PRACTICE, 3.

PROVISIONAL ASSIGNEE.

See INSOLVENT DEBTOR, 1.

RECOGNIZANCE.

See AMENDMENT, 1.
BAIL, 1.

RECOVERY.

1. A recovery may pass, although the words, "their attorneys,"

RECOVERY.

were omitted in the warrant of attorney given by two vouchees. *Ward*, demandant; *Aldersey*, tenant; *Wilson*, vouchee, *E. 4 G. 4.* Page 51

2. Where two of the commissioners, named in the *dedimus*, and before whom the acknowledgment was taken, were the attorneys for the vouchees, the Court would not allow the recovery to pass. *Connop*, demandant; *Lennard*, tenant; *Alder*, vouchee. *T. 4 G. 4.* 274
3. The exemplification of a recovery, may be amended by transposing the words, "an inbound common," from a libe where they had been inadvertently inserted, to their appropriate place, they having no meaning without such transposition, so as to effectuate the intention of the parties. *Willisford*, plaintiff; *Fairbank*, tenant; *Gill*, vouchee, *T. 4 G. 4.* 324
4. When in the warrant of attorney, the words, "to gain or lose in a plea of trespass," were inserted by mistake, instead of the usual words "to gain or lose in a plea of land," the Court permitted the recovery to pass, as the word *trespass* might be rejected as surplusage. *Palmer*, plaintiff; *Meredith*, tenant; *Eggington*, vouchee, *M. 4 G. 4.* 339
5. Where in a deed to lead the uses, the premises were described as a farm, in the parish of *L.*, late in the occupation of *J. H.*, and it was afterwards discovered that part of the farm was situate in the parish of *A.*, which was not mentioned in the deed; the Court refused to

REPLEVIN.

allow the recovery to be amended, by describing the farm as being situate in both parishes, although it was sworn that the whole of the farm was in the occupation of *J. H.*, and was intended to pass, and that the premises had been since enjoyed consistently with the deed. *Elliot, (Lord), vouchee, H. 4 & 5 G. 4. Page 520*

6. A recovery may be amended by inserting the words, "the avowson of," before those of "the rectory of the church of *H.*" on an affidavit stating that there had been no vacancy since the rectory was suffered, and that the church was then full. *Chambers, plaintiff; Blake, tenant; Bumpfylde, vouchee, H. 4 & 5 G. 4. 586*

RENT.

See **BANKRUPT, 1.**
DISTRESS, 3.

REPLEVIN.

See **DISTRESS, 3.**
WITNESS, 1.

1. Where, in replevin, for taking the plaintiff's cow, the defendant avowed, that he being seised of a messuage, to which common of pasture was appurtenant, distrained the said cow, *damage feasant*; and the plaintiff pleaded in bar, that there was a custom that a person seised in fee of the messuage, might demise the right of common of pasture, independently of the actual possession of such messuage; and that there had

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been a demise *according to the custom*:—*Held*, that such plea was bad on general demurrer, as the nature of the custom should be set out with precision and certainty, and that it should appear on the face of the plea, whether the demise was *by deed* or not; and it seems that a custom to demise such right by parol cannot be supported; as it is in the nature of an incorporeal hereditament, which cannot be demised without deed. *Lathbury v. Arnold, E. 4 G. 4. Page 72*

2. The Court allowed several avowries in replevin to be amended, by altering the name and description of the *locus in quo*, and stating the holding to have been for a year, instead of half a year, and also by adding new avowries, varying the amount of the rent; although issue had been joined, and notice of trial given and countermanded, and more than two terms had elapsed previously to the application for the amendment. *Prior v. Buckingham, (Duke), H. 4 & 5 G. 4. 584*

REPLEVIN BOND.

1. Where an avowant in replevin obtained a verdict against the sheriff for having taken insufficient pledges on a replevin bond, which had been taken by his replevin clerk, against whom he brought an action for negligence, and the attesting witnesses to the bond proved that the sureties did

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not reside within the bailiwick of the sheriff, and that one of them occupied a farm well stocked at the time the bond was executed:—*Held*, that such clerk was not answerable, as it was not incumbent on him to make personal enquiries as to the responsibility of the sureties; if they are apparently responsible, it is sufficient; and it seems that when they reside out of the bailiwick of the sheriff, by whom the bond is taken, it is necessary to search the sheriff's office where they do reside, in order to ascertain whether any process had been sued out against them before the bond is taken. *Sutton v. Waite*, *E. 4 G. 4.* Page 27

REPLICATION.

See FALSE IMPRISONMENT.

RETURN OF WRIT.

See SHERIFF, 4.

REVERSIONER.

See WITNESS, 2.

RIGHT, WRIT OF.

See AMENDMENT, 2.

RULE OF COURT.

See ATTACHMENT, 5, 6.
PRACTICE, 1, 13.

SALE.

See SHIP, 2, 3.

SATISFACTION.

See PRACTICE, 12.

SCHOOLMASTER.

1. The visitors and feoffees of a free grammar school, who had dismissed the schoolmaster for misconduct or breach of the regulations of the deed of endowment, cannot maintain ejectment to recover the possession of the school-house, unless they had determined the master's interest therein, by summoning him to appear before them, previously to his dismissal, in order that he might be heard in answer to any charges that might be brought against him, and on which such dismissal might be founded. *Doe d. Thanet (Earl) v. Gartham*, *M. 4 G. 4.*

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SCIRE FACIAS.

1. Where two writs of *scire facias* had been sued out against the defendants, on a recognizance of bail, and to which two *nihil*s were returned, on which judgment was signed and execution issued; the Court refused to set aside such judgment and execution, on the ground that the bail had no notice of the writs of *scire facias* having issued, although they lived in the county of *Middlesex*; as by their entering into a recognizance, they made themselves personally liable, and it was their duty to watch the proceedings in the sheriff's office. *Smith v. Crane*, *E. 4 G. 4.* 8

SHAM PLEA.

See PRACTICE, 19.

SHERIFF.

SHERIFF.

See ARREST, 2.

BAIL, 1.

EVIDENCE, 2.

REPLEVIN BOND.

1 Where, in a joint cause of action against two defendants, the sheriff was served with two different rules to bring in the bodies:—*Held*, that two writs of attachment should be issued against the sheriff, on his non-compliance with such rules. *Constable v. Bristow*, E. 4 G. 4. Page 162

2 Where a sheriff levies for arrears of taxes under the statute 48 Geo. 3, c. 141, No. 5, Rule 2, he is not entitled to a month's notice, previously to an action being commenced against him for an irregularity in the levy, there being no clause in that act requiring such notice. *Copland v. Pocell*, M. 4 G. 4. 400

3 Where the sheriff under a writ of *fi. fa.* levied and sold a vessel, the joint property of two defendants, and after satisfying the plaintiff his demand and expenses of the levy, a surplus remained in his hands, and the defendants disputing their interests in the vessel, the sheriff refused to pay over such surplus, unless the one to whom it was paid would indemnify him against the claims of the other, which they both refused to do; the Court would not interfere, nor allow the sheriff to pay the money into Court, to remain there, until an indemnity was given, to the satisfaction of the

SHIP AND SHIPPING. 357

Prothonotary. *Hartley v. Stead*, H. 4 & 5 G. 4. Page 466

4 Where a writ was returnable on the morrow of *All Souls*, viz. on the 3d November, and the defendant surrendered himself to the sheriff's officer on that day, and went to prison on the 5th, and the sheriff having been ruled to bring in the body, returned that he had taken the defendant, whose body he then had ready, and an attachment was afterwards issued against the sheriff for not bringing it in; the Court set aside the attachment on the payment of all costs as between attorney and client, and allowed the return to be amended according to the fact. *Rex v. Wills*, (*Sheriff*), H. 4 & 5 G. 4. 518

SHERIFF'S OFFICER.

See ARREST, 2.

SHIP AND SHIPPING.

See INSURANCE.

1 Where the second mate of a vessel was ordered, with three other seamen, to take the ship's boat and convey the captain on board, who had gone on shore at the *Mauritius*, and on their getting on shore they refused to return with him, but remained there all night, and he was obliged to get back to his ship in another boat, and redeem his own on the following morning; when such mate was taken before a magistrate at the *Mauritius* and committed to prison for a month:—*Held*,

- that this was such an act of disobedience, as to warrant the captain to detain his property on board the vessel by way of forfeiture; and consequently, that trover could not be maintained against the captain for such detention. *Weatherpen v. Laidler*, E. 4 G. 4. Page 37
2. The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity:—Therefore, where indigo was shipped at *Calcutta* consigned to *London*, under a bill of lading, by which the damages and accidents of the seas, and of navigation of what kind soever were excepted, and the vessel sustained considerable damage in the course of the voyage, and put into the *Mauritius* in a sinking state, where the captain abandoned her, and placed her and the cargo at the disposal of the Vice Admiralty Court, who, after survey, ordered both to be sold; but it appeared that the cargo might have been transhipped there, and forwarded to its port of destination by another vessel, and that his own ship might have been repaired, although at a considerable expense:—*Held*, that the owners of the ship were liable to the owners of the cargo, in an action on the case for non-delivery thereof at the place of destination, as it was the duty of the captain either to have repaired the vessel, or transhipped the cargo. *Cannan v. Meaburn*, E. 4 G. 3. 127
3. Where a ship was so far injur-

ed by a storm, that it was found on survey, at a foreign port, that the expenses of repairing her would exceed her original value, and the captain sold her *bonâ fide*, and for the benefit of all concerned, and the purchasers shortly afterwards broke her up:—*Held*, that this was such a case of urgent necessity, as to justify the sale. *Robertson v. Clarke*, E. 4 & 5 G. 4. Page 622

4. In an action on the case against ship owners, to recover damages sustained by the loss of goods shipped on board their vessel, where the completion of the voyage was prevented by the improper sale of the ship by the captain abroad:—*Held*, that the value of the ship was to be calculated at the time of the sale, and not at the time of the commencement of the voyage, and that the owners were only liable for the amount of the freight which might have been earned if the vessel had completed her voyage, and not the amount of freight as calculated on at the time of its commencement. *Cannan v. Meaburn*, E. 4 & 5 G. 4. 633

SOUTHWARK COURT OF REQUESTS.

See COSTS, 3.

STAMPS.

See APPRENTICE.

1. Where the plaintiff, being in advance to the defendant's son, for the cost of part of a cargo

of fish, in which the latter was partly interested, wrote to him, stating that he had drawn bills on him, and requesting him to accept them, and which were to be appropriated for the repayment to the plaintiff; and the defendant's son was on the other hand to remit the plaintiff the proceeds of the cargo, to meet the payment of the acceptances: and the son agreed to the contents of that letter, by a memorandum written and signed by him, at the foot thereof: and the defendant afterwards, by a guarantie, written by him at the back of the same letter, agreed to pay the plaintiff, or his bankers, all sums which might come to his hands, agreeably to the terms of such letter, and be responsible to the plaintiff for the proceeds that might be procured by his son for the cargo:—*Held*, in an action of *assumpsit* on the guarantie, that one agreement stamp was sufficient under the statute 55 Geo. 3, c. 184, as the whole of the instrument containing the guarantie must be taken together, and as forming part of one transaction. *Stead v. Liddard*, *E. 4 G. 4.* 2

2. Where an affidavit to set aside a judgment of *non-pros* for irregularity, was entitled as being in two several causes against separate defendants, but written on one sheet of paper, and with one stamp only:—*Held* to be insufficient. *Worley v. Ryland*, *T. 4 G. 4.* 238

3. Where the defendant, as sure-

ty in a bond, which after reciting that his principals *A. B.* and *C. D.* were bankers at *Sunderland*, was conditioned for the securing such sum or sums as should be advanced to meet bills of exchange drawn by *A. B.* and *C. D.*, or either of them on the plaintiffs, (the obligees), who were bankers in *London*, under a penalty of 5000*l.*:—*Held*, that the bond having been given previously to the passing of the statute 48 Geo. 3, c. 149, was properly stamped with a 7*l.* stamp, as being applicable to the amount of the penalty under the statute 44 Geo. 3, c. 98. *Simson v. Cooke*, *H. 4 & 5 G. 4.* Page 588

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See LIMITATIONS, STATUTE OF.

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TRESPASS. 739

TIME, COMPUTATION OF.

See LIMITATION OF ACTIONS.

TRESPASS.

See COSTS, 2, 5.

FALSE IMPRISONMENT.

1. No person can be excused of committing a trespass unless he can justify that the act complained of arose entirely without his default. Where, therefore, in trespass for an injury done to the plaintiff's horse in consequence of the defendant's driving a gig against it, it was proved that the defendant drove a high-spirited horse unskilfully and without a curb chain, and the defendant pleaded, *first*, not guilty; and *secondly*, that his horse took fright and became ungovernable in consequence of a cart being driven furiously against it; which was not supported by evidence;—and the Judge was of opinion that the defendant was liable, although he might not have been guilty of an act of negligence, or want of caution; and the jury found a verdict for the plaintiff.—The Court refused to grant a new trial, which was moved for on the ground that it should have been left to the jury to say, whether under all the circumstances, the accident was unavoidable, or occasioned by the negligence of the defendant. *Wakeman v. Robinson*, E. 4 G. 4. 63
2. Where in an action of trespass for an assault and false imprisonment, the declaration contained two counts, and the defendant pleaded, *first*, the gene-

ral issue; and *secondly*, that he and one J. W. having justified as bail for the plaintiff in an action then pending, he arrested the plaintiff, to render him in discharge of the recognizance, and detained him in custody until he had satisfied the demand for which the latter action was brought, and the plaintiff replied *de injuriâ*;—and it appeared in evidence that the defendant, in addition to detaining the plaintiff until he had satisfied such demand, caused him to be detained an hour longer, and until he had given a security for the expenses incurred by the defendant's becoming bail:—*Held*, that this was one continuing trespass and imprisonment, and therefore that the plaintiff ought either to have newly assigned or replied the excess, in order to entitle him to recover for the additional detention or imprisonment, which was unjustifiable or illegal. *Lambert v. Hodgson, T. 4 G. 4.*

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3. Where the plaintiff entered a public house after it had been closed for the night, and refused to tell the occupier how he obtained admission, on which he sent for a constable and charged the plaintiff with felony, on which he was detained in custody two days:—*Held*, that the occupier was not justified in making such a charge, and consequently that to an action of trespass for false imprisonment, a plea stating that he was not acting in aid of a constable, in taking the plaintiff into custo-

dy, could not be supported; his remedy was by turning him out of the house. *Rose v. Wilson, M. 4 G. 4.* *Page 362*

4. Where the plaintiff declared in trespass, that the defendant broke and entered his close, and broke open the gates thereof, and also broke and entered his house, and there seized and took divers of the plaintiff's goods and chattels, to wit, one hundred articles of furniture, and one hundred articles of wearing apparel, without describing the nature or quality; and the defendant being under a judge's order to plead issuably, demurred generally to the whole declaration, and the plaintiff signed judgment as for want of a plea. The Court ordered it to be set aside with costs, as the demurrer went to the substance of the declaration, the goods taken having been insufficiently described therein. *Holmes v. Hodgson, M. 4 G. 4.* 379

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See EVIDENCE, 2.
PRACTICE, 4.

1. Where the second mate of a vessel was ordered, with other seamen, to take the ship's boat, and convey the captain on board, who had gone on shore at the *Mauritius*, and on their getting on shore they refused to return with him, but remained there all night, and he was obliged to get back to his ship in another boat, and redeem his own on the following morning;

UNNECESSARY COUNTS.

when such mate was taken before a magistrate at the *Mauritius* and committed to prison for a month: — *Held*, that this was such an act of disobedience, as to warrant the captain to detain his property on board the vessel by way of forfeiture, and consequently, that trover could not be maintained against the captain for such detention. *Weatherpen v. Laidler*, E. 4 G. 4. Page 37

2. Where, in an action of trover, the plaintiff claimed under an assignment by bill of sale from the sheriff, on an execution issued by him against *J. S.* who afterwards became bankrupt, and the defendants, as his assignees, seized the goods by virtue of the commission, but did not defend the action as such, or were proved to have acted in that character at the trial; it seems they must be considered as strangers; and consequently that it was incumbent on the plaintiff to produce an examined copy of the judgment on which the writ of *fi. fa.* was grounded, as well as the writ itself, and the assignment to him from the sheriff. *Glasier v. Eve*, E. 4 G. 4. 46

TRUSTEE.

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See DISTRESS, 1.

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VISITOR.

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WARDEN OF THE FLEET.

1. The clerk of the papers in the *Fleet Prison* is entitled to a fee of 2s. 6d. on every action from which a prisoner is discharged; and which is payable under the rule of court, *Easter and Trinity Terms*, 1727. And the Court refused to order the warden to return a sum taken by him, on the discharge of a prisoner, on account of such fees. *Rochfort, ex parte*, E. 4. G. 4.

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WARRANTY.

1. Where, in an action on the warranty of a horse, the plaintiff obtained a verdict, the Court will not grant a new trial on the grounds that there was no known disease to constitute such an unsoundness as that set up by the plaintiff; or that the defendant was taken by surprise;

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WITNESS.

3. Where a person was served with a *subpoena duces tecum*, on the 2d of July, by which he was required to attend the trial of a cause in *London* on the 2d of that month:—*Held*, that as a particular day was inserted therein, which had passed before the service, the Court could not interfere by granting an attachment for the non-compliance with the terms of the *subpoena*; although it was tested

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properly on the last day of the preceding Term, and theittings did not commence till the day on which the *subpoena* was dated. *Alexander v. Dixon*, M. 4 G. 4. Page 387

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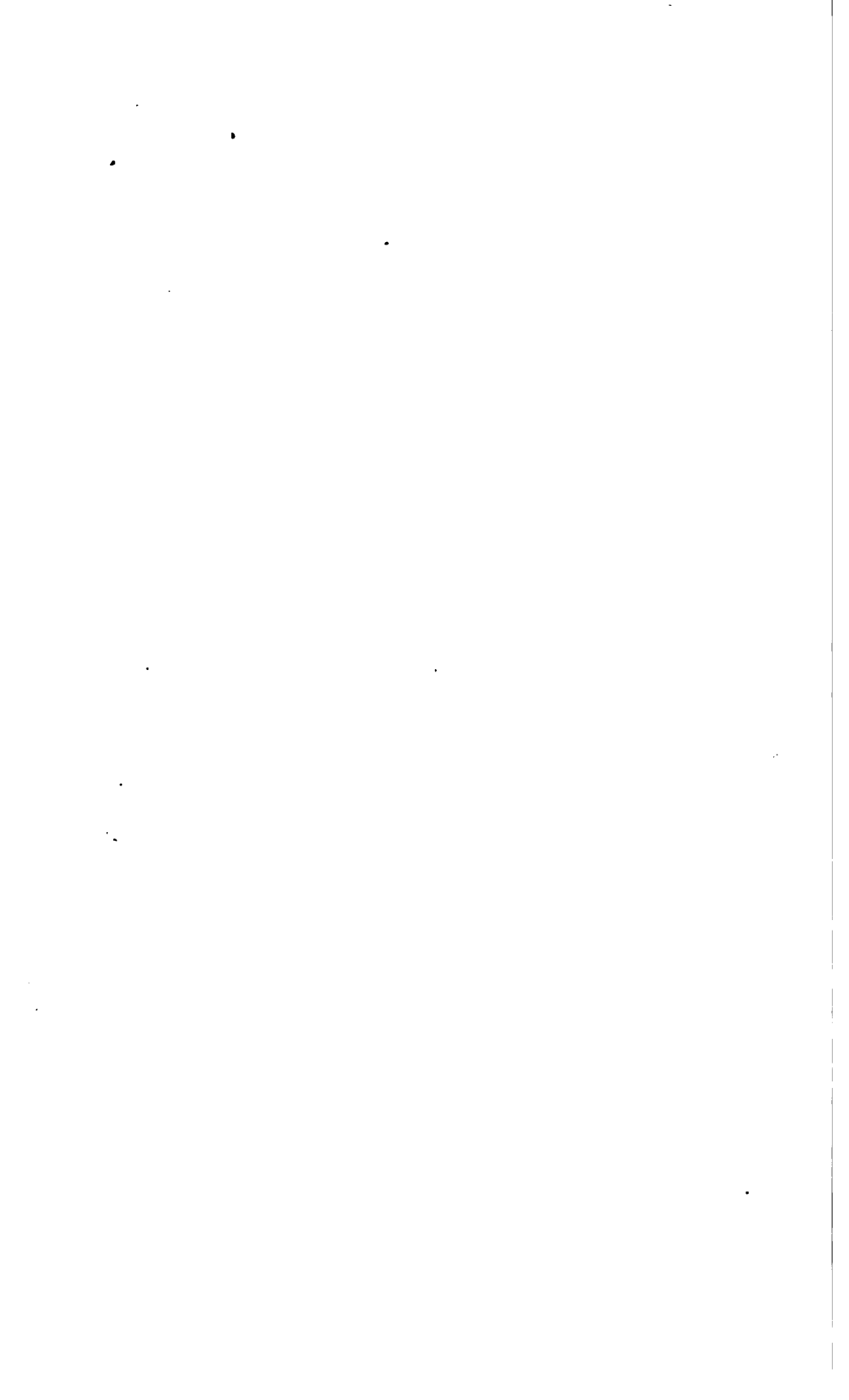
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END OF THE EIGHTH VOLUME.

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W. M'DOWALL, PRINTER, FEMBERTON-ROW, GOUGH-SQUARE.





STAMPS.

of fish, in which the latter was partly interested, wrote to him, stating that he had drawn bills on him, and requesting him to accept them, and which were to be appropriated for the repayment to the plaintiff; and the defendant's son was on the other hand to remit the plaintiff the proceeds of the cargo, to meet the payment of the acceptances: and the son agreed to the contents of that letter, by a memorandum written and signed by him, at the foot thereof: and the defendant afterwards, by a guarantie, written by him at the back of the same letter, agreed to pay the plaintiff, or his bankers, all sums which might come to his hands, agreeably to the terms of such letter, and be responsible to the plaintiff for the proceeds that might be procured by his son for the cargo:—*Held*, in an action of *assumpsit* on the guarantie, that one agreement stamp was sufficient under the statute 55 Geo. 3, c. 184, as the whole of the instrument containing the guarantie must be taken together, and as forming part of one transaction. *Stead v. Liddard*, *E. 4 G. 4.* 2

2. Where an affidavit to set aside a judgment of *non-pros* for irregularity, was entitled as being in two several causes against separate defendants, but written on one sheet of paper, and with one stamp only:—*Held* to be insufficient. *Worley v. Ryland*, *T. 4 G. 4.* 238

3. Where the defendant, as sure-

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ty in a bond, which after reciting that his principals *A. B.* and *C. D.* were bankers at *Sunderland*, was conditioned for the securing such sum or sums as should be advanced to meet bills of exchange drawn by *A. B.* and *C. D.*, or either of them on the plaintiffs, (the obligees), who were bankers in *London*, under a penalty of 5000*l.*:—*Held*, that the bond having been given previously to the passing of the statute 48 Geo. 3, c. 149, was properly stamped with a 7*l.* stamp, as being applicable to the amount of the penalty under the statute 44 Geo. 3, c. 98. *Simson v. Cooke*, *H. 4 & 5 G. 4.* Page 688

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